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ABSTRACT

The Family Educational Rights and Privacy Act of 1974 (FERPA), otherwise known as the Buckley Amendment, is an amendment passed by Congress to protect the privacy and rights of postsecondary students. Researchers seeking information about FERPA have faced difficulty in finding pertinent source materials on the subject. This compendium gathers together legislation, regulations, articles, letters, memos, outlines, sample policies, etc., that pertain to the interpretation of the amendment. Individual sections of the report cover: the statute and the regulations; the legislative and regulatory history; interpretive materials, including technical assistance letters from the U.S. Department of Education's Family Policy Compliance Office; journal articles; outlines and memos; and sample policies and forms. Also included in the document is an annotated bibliography of selected additional materials. (JM)

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ED 435 355

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT:

A LEGAL COMPENDIUM

Edited by
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EDITOR'S NOTE

Enacted as a seemingly inconsequential floor amendment, and seldom litigated over issues of any true significance, the Family Educational Rights and Privacy Act of 1974, *a.k.a.* "FERPA" or the "Buckley Amendment," has nevertheless confused, frustrated, and bedeviled college and university counsel throughout the 25 years of its existence. Indeed, FERPA has been the subject of more *1000* NACUANET messages to date, making it perhaps the most frequent topic of inquiry and discussion.

One of the greatest of FERPA frustrations has been that the most useful and relevant materials concerning it are among the most difficult to find. It was with that in mind that we have assembled this collection of primary source materials, including what legislative and regulatory history exists and more than 30 of the most significant technical assistance letters from the U.S. Department of Education's Family Policy Compliance Office (FPCO), along with a number of sample policies and forms and several detailed analyses. Together, these materials contain a wealth of tools to assist in clearing a path through the FERPA thicket. Readers seeking to complement this compendium with a practical primer will find AACRAO's *Guidelines for Postsecondary Institutions for Implementation of FERPA* (1998 ed.) an excellent addition to their FERPA libraries; it may be ordered online at <http://aacrao.com>. Those who cannot find their answer here may also contact FPCO's "FERPA hotline" by phone at (202) 260-3887, by fax at (202) 260-9001, or by e-mail at FERPA@ed.gov.

We have assembled this compendium in loose-leaf format partly by design and partly as an experiment. Given the accelerating pace of FERPA amendments and developments in recent years, this compendium could quickly become outdated, so we hope to supplement it regularly, rather than to revise it all at once on a longer-term schedule. In addition, we expect that many of you will wish to annotate this compendium with your own materials. Please let us know whether you find this format useful and whether it should be considered for future compendia.

Many thanks to the numerous NACUANETeers who contributed suggestions, materials, and assistance to this effort – especially NACUA member Robert Bienstock, who generously shared both his extensive ideas and his extensive cache of FERPA-related materials, and NACUA Publications Manager Linda Henderson, whose organizational assistance and extraordinary patience were invaluable. We hope that you find this compendium useful, and we welcome your comments, suggestions, and, of course, copies of any other FERPA-related materials that we have missed.

Steven J. McDonald
The Ohio State University
August 1999

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A. STATUTE AND REGULATIONS

1. 20 U.S.C. § 1232g (1998)
2. 34 C.F.R. Part 99 (1998)

UNITED STATES CODE
TITLE 20 - EDUCATION
CHAPTER 31 - GENERAL PROVISIONS CONCERNING EDUCATION
SUBCHAPTER III - GENERAL REQUIREMENTS AND CONDITIONS CONCERNING OPERATION AND ADMINISTRATION OF EDUCATION PROGRAMS: GENERAL AUTHORITY OF SECRETARY
Part 4 - Records; Privacy; Limitation on Withholding Federal Funds

Current through Public Law 105-244, approved October 7, 1998

Sec. 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1) (A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations –

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5) (A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or

personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or

(ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted –

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if –

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J) (i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena. Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or

providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless –

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4) (A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6) (A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime of offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18, United States Code), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding –

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from –

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) IN GENERAL- Nothing in this Act or the Higher Education Act of 1965 shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if –

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) STATE LAW REGARDING DISCLOSURE- Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(1) For a recipient, take an action authorized under 34 CFR part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under §98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

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AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

SOURCE: 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in §99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency provides administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996]

§99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

NOTE: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996]

§99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Directory information means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

Educational agency or institution means any public or private agency or institution to which this part applies under §99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education records. (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of §99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally identifiable information includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

[53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996]

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

(Authority: 20 U.S.C. 1232g(d))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993]

§ 99.6 [Reserved]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g (e) and (f))

[61 FR 59295, Nov. 21, 1996]

§99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of §99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[60 FR 3469, Jan. 17, 1995]

Subpart B—What Are the Rights of Inspection and Review of Education Records?

§99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under §99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the

SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in §99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

Subpart C—What Are the Procedures for Amending Education Records?

§99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under §99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by §99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States;

(ii) The Secretary; or

(iii) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of §99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii) If the educational agency or institution initiates legal action against a parent or student and has complied with paragraph (a)(9)(ii) of this section, it may disclose the student's education records that are relevant to the action to the court without a court order or subpoena.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in §99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in §99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure is to an alleged victim of any crime of violence, as that term is defined in section 16 of title 18, United States Code, of the results of any disciplinary proceeding conducted by an institution of postsecondary education against the alleged perpetrator of that crime with respect to that crime.

(b) This section does not forbid an educational agency or institution to disclose, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11) and (13) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b)(1), (b)(2), (b)(4)(B), and (f))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996]

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made pursuant to court orders or lawfully issued subpoenas under §99.31(a)(9), to disclosures of directory information under §99.31(a)(11), or to disclosures to a parent or student under §99.31(a)(12).

(d) Except for disclosures under §99.31(a) (9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of §99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

§99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under §99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under §99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

§99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in §99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under §99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

§99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or

well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

[61 FR 59297, Nov. 21, 1996]

Subpart E—What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, *Office* means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

§99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

§99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U. S. Department of Education, Washington, DC 20202-4605.

(Authority: 20 U.S.C. 1232g(g))

[58 FR 3189, Jan. 7, 1993, as amended at 61 FR 59297, Nov. 21, 1996]

§99.64 What is the complaint procedure?

(a) A complaint filed under §99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office extends the time limit in this section if the complainant shows that he or she was prevented by circumstances beyond the complainant's control from submitting the matter within the time limit, or for other reasons considered sufficient by the Office.

(Authority: 20 U.S.C. 1232g(f))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

§99.65 What is the content of the notice of complaint issued by the Office?

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under §99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of §99.64.

(Authority: 20 U.S.C. 1232g(g))

[58 FR 3189, Jan. 7, 1993]

§99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(NOTE: 34 CFR part 78 contains the regulations of the Education Appeal Board)

(Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234)

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

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B. LEGISLATIVE AND REGULATORY HISTORY

1. 120 Cong. Rec. 14,579 (May 14, 1974) (introduction of, and debate on, proposed amendment).

2. 120 Cong. Rec. 36,528 (Nov. 19, 1974) (reprint of a collection of articles and explanatory statements).

3. 120 Cong. Rec. 39,858 (Dec. 13, 1974) (colloquy between Senator McIntyre and Senator Pell; proposed further amendment; and joint statement of Senator Buckley and Senator Pell).

4. 121 Cong. Rec. 13,990 (May 13, 1975) (reprinted speech of Senator Buckley before the Legislative Conference of the National Congress of Parents and Teachers).

5. 41 Fed. Reg. 24,662 (June 17, 1976) (initial regulations).

6. 53 Fed. Reg. 11,941 (April 11, 1988) (substantial "simplifying and clarifying" revisions and analysis).

7. 60 Fed. Reg. 3,463 (Jan. 17, 1995) (revisions and analysis pertaining to disciplinary and law enforcement records).

8. 61 Fed. Reg. 59,291 (Nov. 21, 1996) (revisions and analysis pertaining to disciplinary records, subpoenas, use of education records in lawsuits, third-party disclosures, and miscellaneous other issues).

9. 63 Fed. Reg. 56,819 (Oct. 23, 1998) (final regulations for, and analysis of, Solomon Amendment).

10. 64 Fed. Reg. 29,532 (June 1, 1999) (proposed regulations to implement the Higher Education Amendments of 1998)

Mr. McCLELLAN. Give us 5 or 10 minutes on the______

Mr. ROBERT C. BYRD. Mr. President, if we are not careful, we are going to get in one h-e-c-k of a fix tomorrow on the Gurney amendment. The Senator was here when we entered into this agreement. I hope we will not abuse that agreement _____

Mr. JAVITS. If the Senator needs a few minutes to consider it, I would ask unanimous consent that I may yield for 10 minutes to the Junior Senator from New York (Mr. BUCKLEY) to discuss whatever amendments he brings up, with leave to present this amendment and then to return to the amendment which I have pending.

The PRESIDING OFFICER. Is the Senator for yielding time from the bill?

Mr. JAVITS. I cannot yield time. He has got to do it on his own time. I ask unanimous consent, Mr. President, that I may lay aside the amendment which I have pending for 10 minutes and then return to it.

The PRESIDING OFFICER. Is there objection to the request of the Senator from New York (Mr. JAVITS)? The Chair hears none, and it is so ordered.

Mr. GRIFFIN. Mr. President, reserving the right to object, I did not understand that the Senator from New York had an amendment pending.

Mr. JAVITS. I do.

Mr. GRIFFIN. Is there a time limitation on it?

Mr. JAVITS. Yes; there is a time limit on it of 30 minutes. My time has expired but Senator MCCLELLAN's time has not. I could get time from the bill, of course.

Mr. McCLELLAN. I have only 2 more minutes remaining because I yielded my time trying to get the unanimous-consent agreement.

Mr. PELL. Mr. President, I am delighted to yield 10 minutes if it will help us move along on the pending bill.

The PRESIDING OFFICER. Is there objection to the request of the Senator from New York? The Chair hears none, and it is so ordered.

The junior Senator from New York (Mr. BUCKLEY) is now recognized.

AMENDMENT NO. 1289

Mr. BUCKLEY. Mr. President, I call up my amendment No. 1289 and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

On page 330, between lines 17 and 18, insert the following new section:

"PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

"SEC. 437. (a) RIGHT OF ACCESS AND OF A HEARING. --- (l) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, preschool, or any other educational institution which has a policy of denying, or which effectively prevents the parents of students under eighteen years of age attending any school of such agency, or attending such institution of higher education, community college, school, preschool, or other educational institution, the right to inspect and review any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns. Where such records or data include information on more than one student, the parents of any student shall be entitled to receive, or be informed of, that part of such record or data as pertains to their child. Each recipient shall establish appropriate procedures for the granting of a request by parents for access to their child's school records within a reasonable period of time, but in no case more than forty-five days after the request has been made.

"(2) Parents shall have an opportunity for a hearing to challenge the content of their child's school records, to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein.

"(b) PARENTAL CONSENT. --- (l) No student shall, as a part of an applicable program, be required to undergo medical, psychological, or psychiatric examination, testing, or treatment, or immunization (except to the extent necessary to protect the public from epidemics of contagious diseases), or to reveal information about his or her personal or family life without the prior, informed, written consent of the student's parents.

"(2) No student shall, as a part of any applicable program, be required, without the prior, informed, written consent of the student's parents, to participate in any project program, or course, the primary purpose or principal effect of which is to affect or alter the personal behavior or personal values of a student, or to explore and develop teaching techniques or courses primarily intended to effect such behavior and values.

"(3) Parents shall be informed, reasonably in advance and in writing, of the intended participation of their child in any research or experimentation project which is a part of an applicable program. No child shall participate in such a project if the parents of such child object to such participation.

"(4) As used in this subsection the term 'research or experimentation project' means any project or program which is a part of an applicable program, and which is authorized by an administrative officer of an education agency, a State or local education agency, or any education institution, including preschools, for the purpose of research or experimentation, except that research or experimentation projects shall not include projects in the field of reading or bilingual education, as determined by the Commissioner.

"(c) CONDITIONS FOR THE RELEASE OF PERSONAL DATA -- (l) No funds shall be made available under any applicable program to any State or local education agency, any institution of higher education, any community college, any school, preschool, or any other educational institution which has a policy of permitting the release of records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization, other than the following --

"(A) other school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests;

"(B) to officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.

"(2) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, preschool, or any other educational institution which has a policy or practice of furnishing, in any form, any information contained in personal school records, to any persons other than those listed in subsection (c) (1) unless --

"(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

"(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the education institution or agency.

"(3) In any case in which the Secretary or an administrative head of an education agency is authorized under any applicable program to request or require any State or local educational agency, any institution of higher education, any community college, any school, preschool, or any other educational institution to submit to a third party (or to the Secretary or an administrative head of an education agency, as defined in section 409 of this Act) any data from personal statistics or records of students, such data shall not include the names of students or their parents (in code or otherwise) without the written consent of the student's parents, except --

"(A) in connection with a student's application for financial aid;

"(B) in compliance with any court order, or pursuant to any lawfully issued subpena, if the parents and students are notified of any such order in advance of the compliance therewith by the State or local educational agency, the institution of higher education, the community college, the school, preschool, or other educational institution.

"(4) (A) With respect to subsections (c) (1) and (c) (2) and (c) (3), all persons, agencies, or organizations desiring access to the records of a student shall be required to sign a written form which shall be kept permanently with the file of the student, but only for inspection by the parents or student, indicating specifically the legitimate educational or other interest that each person, agency, or organization has in seeking this information. Such form shall be available to parents and to the school official responsible for record maintenance as a means of auditing the operation of the system.

"(4) (B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

"(d) PROTECTION OF PERSONAL DATA. --- The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency (as defined in section 409 of this Act). Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data gathering activities shall be conducted by the Secretary, or an administrative head of an education agency have responsibilities under an applicable program unless such activities are authorized by the Act establishing such a program.

"(e) For the purposes of this section, whenever a student has attained eighteen years of age, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

"(f) No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students, if they are eighteen years of age or older, of the rights accorded them by this section.

"(g) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act.

"(h) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section, according to the procedures contained in subsections (c) and (d) of section 421 of this Act.

"(i) With respect to any funds obligated prior to the effective date of this section to any State or local educational agency, any institution of higher education, any community college, any school, preschool, or any other educational institution, continued furnishing of such funds shall cease January 1, 1975, if the recipient has failed to meet the conditions for funding established by this section.

" (j) The provisions of this section shall become effective ninety days after the date of enactment of this Act.

" (k) This section may be cited as the 'Family Educational Rights and Privacy Act of 1974'."

On page 122, in the table of contents, after the item "SEC. 512" insert the following:

"SEC. 513. Protection of the rights and
privacy of parents and students.".

Mr. BUCKLEY. Mr. President, I send to the desk two perfecting amendments. Through some oversight the Printing Office failed to include two provisions in the amendment.

The PRESIDING OFFICER. Does the Senator from New York ask unanimous consent that his amendment be so modified?

Mr. BUCKLEY. Mr. President, yes, I so request.

The PRESIDING OFFICER. Without objection, it is so ordered, and the amendment is so modified.

The text of the perfecting amendments is as follows:

on page 1, between lines 2 and 3, insert the following:

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

SEC. 513. Part C of the General Education Provisions Act is amended by adding at the end thereof the following new section:

On page 4, line 23, after the word "other" insert the word "local."

Mr. BUCKLEY. Mr. President, as more stories come out in the media about the abuses of personal data by schools and Government agencies, the public and Congress have become increasingly aware of the problems such abuses pose. In addition, the revelations coming out of Watergate investigations have underscored the dangers of Government data gathering and the abuse of personal files, and have generated increased public demand for the control and elimination of such activities and abuses. It is appropriate, therefore, that we take this opportunity to protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities.

Many absurd and sometimes tragic examples of similar abuses exist. Let me recount one of the cases described in the recent article, "How Secret School Records Can Hurt Your Child," in Parade magazine:

The parents of a junior high student are told their daughter won't be able to attend graduation ceremonies because she's a "bad citizen." What has she done that's bad, the parents ask? Well, the principal says, the school had a whole file on her "poor citizenship," but the parents can't know what's in that file. In this Catch-22 case, one of the few to get a legal hearing, the New York State Commissioner of Education, Ewald B. Nyquist, stated flatly that the school's argument that it was acting in the best interest of the student in refusing to reveal the information to the parents -- had no merit. The commissioner concluded: "It is readily apparent that no one had a greater right to such information than the parents."

When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.

Many examples of abuses can be found in recent letters to the National Committee for Citizens in Education which has for a long time carried on the fight for the right of parents to have access to their children's records by alerting and assisting parents across the Nation. I would like to take this opportunity to commend that committee for its dedicated efforts, and to mention that the NCCE will very shortly publish a major study entitled "Children, Parents and School Records." It is must reading for anyone who is concerned with the issue of privacy and the schools.

Violations of the privacy of students and their parents occur daily in schools across the Nation, through courses requiring the student to reveal personal data and feelings, and by means of demands by the Federal Government for personal information on students and parents. The recent refusal of the District of Columbia School Board to refuse to administer a battery of tests, despite a threat by the Federal Office of Education to cut off nearly $6 million in Federal funds to the city's public school system, is a good case in point. The superintendent of the schools, Barbara Sizemore, charged that many items in the tests, which are required in other school districts around the Nation, are a violation of privacy and could cause psychological damage to students.

The New York City School Board refused to comply with a similar demand. Dr. Seymour Lachman, president of the school board, said that the original demand "violated the confidentiality of student records" and that, lacking proper safeguards, the data might be misused or abused. He added that:

"These kinds could have been categorized, codified, and stereo-typed for life on the basis of information put on the tape while they were in school."

In addition to being denied access to their children's school records, parents are often unable to readily review the instructional materials in various courses in which their children are enrolled. And often they are not asked to give their consent before their child is given very personal or psychological tests, or participate in experimental programs or attitude-affecting courses.

The secrecy and the denial of parental rights that seem to be a frequent feature of American education is disturbing. Some school administrators and educators seem to have forgotten that parents have the primary legal and moral responsibility for the upbringing of their children and only entrust them to the schools for basic educational purposes.

Some educators seem to feel that they know much more about the welfare and best interests of the child than do the parents, and therefore, once a child comes under their sway, they think they have the right to do what they themselves think is best for the child, without regard for values and beliefs of the parents.

The world-famous child psychiatrist, John Bowlby, noted in an interview concerning the care of young children last year, that:

"The criticizing of parents and taking the children out of the home and putting them into the schools as is being commonly suggested these days actually undermines the parental confidence in the parents' own role, and in their potential role. There is entirely too much criticism. The educators are guilty of undermining the home rather than building it up."

There has been an increasing chorus of complaints from parents in the last few years about just such attitudes and actions on the part of some educators. The sense of a loss of control over one's life and destiny, which many social commentators say is growing amongst our citizens, seems to be increasingly felt by parents with respect to the upbringing of their own children.

Such elitist and paternalistic attitudes reflect the widening efforts of some, both in and out of Government, to diminish the rights and responsibilities of parents for the upbringing of their children, and to transfer such rights and functions to the State -- to separate, figuratively, and in some cases, literally, the child from his parents, and to turn him over to the care of the State, as represented by schools and other arms of its administration.

My amendment seeks to restore parental rights and to protect privacy. It will:

First, help insure that parents have the right of access to their children's school records;

Second, help prevent the abuse and improper disclosure of such records and personal data on students and their parents;

Third, require parental consent before such records are disclosed to most third parties;

Fourth, require parental consent or notification before their children are made to undergo certain forms of testing or partake in certain experimental or attitude-affecting programs or activities; and

Fifth, make instructional materials used in the classroom available for review by parents upon request.

In addition, my amendment requires the Secretary of HEW to adopt appropriate safeguards to protect the rights and privacy of students and their families in regard to Government authorized surveys and other data gathering activities.

My amendment broadens the protection of civil rights to include the civil rights of parents and students vis-a-vis the schools. As a matter of fact, a recent Federal court decision has made the civil rights aspect of privacy and parental consent more explicit.

The case was Merriken against Cressman, heard in the U.S. District Court of Eastern Pennsylvania last fall. Let me quote from the summary of the case in "The United States Law Week" of October 16, 1973:

"A school district proposed to use a program entitled Critical Period of Intervention (CPI) for the purpose of identifying potential drug abusers among its eighth-grade students. Additionally, the program would "prepare the necessary interventions, identify resources to train and aid the district personnel to remediate the problems and, finally, to evaluate the results." Parental consent is a prerequisite to a student's participation in the program. Such consent is solicited by a letter which is admittedly a "selling device" and "an attempt to convince the parent to allow the child to participate."

Two child psychiatrists testified without contradiction as to several * * * dangerous aspects of the CPI Program, none of which are mentioned * * * in any of the materials to be made available to parents. These dangers include the risk that the CPI Program will operate as a self-fulfilling prophecy in which a child labeled as a potential drug abuser will by virtue of a label decide to be that which people already think he or she is anyway * * * Another danger mentioned is that of scapegoating in which a child might be marked out by his peers for unpleasant treatment either because of refusal to take the CPI test or because of the result of the test." Additionally, there is a "severe loyalty conflict that might result by asking children the types of personal questions about their relationship with parents and siblings which are included in the CPI questionnaire." Finally the qualifications of the school district personnel who will administer the interventions once potential drug abusers have been identified are woefully inadequate."

The court found that the confidentiality of the program broke down when the school superintendent was informed of the potential drug abusers, who were then required to undergo attempted psychological remediation by ill-trained faculty members. But, said the Judge:

" The ultimate use of this information, although possibly gained with a great deal of scientific success, is the most serious problem that faces the Court. How many children would be labeled as potential drug abusers who in actuality are not, and would be subjected to the problem of group therapy sessions conducted by inexperienced individuals?

Strict confidentiality is not maintained after evaluation and there are many opportunities for a child to suffer insurmountable harm from a labeling when the cruelty of other children is at an extreme. The seriousness of this problem is illustrated by the fact that if one child is so harmed and would be temporarily or permanently damaged by the label of "drug abuser," is this Program worth the effort to identify other actual "drug abusers."

When a program talks about labeling someone as a particular type and such a label could remain with him for the remainder of his life, the margin of error must be almost nil."

The court found that the potential for harm of this program outweighed any good that might accrue, and concluded as a matter of law that the CPI program violated the right of each student and his parents to privacy inherent in the penumbra of the Bill of Rights of the U.S. Constitution.

This case is a microcosm of the problems addressed by my amendment -- the violation of privacy by personal questionnaires, violation of confidentiality and abuse of personal data -- with its harm to the individual -- and the dangers of ill-trained persons trying to remediate the alleged personal behavior or values of students. It describes the potential harm that can result from poorly regulated testing, inadequate provisions for the safeguarding of personal information, and ill-devised or administered behavior modification programs.

In fact, it shows that even the requirement of parental consent can be an inadequate safeguard in the face of the slick and deceptive selling techniques of some educators. Yet, at least the requirement of parental consent informs the parents, to some extent, about what is being done with and to their children in schools, and it offers the best available protection against educational abuses that I can think of. Additionally, it will encourage schools to improve these types of programs and to eliminate the potential for abuses beforehand, thereby tending to reduce the future occurrences of irate parents going to court because of shoddy and harmful programs in the schools.

If anyone doubts the seriousness of the problem, I direct their attention to a recent communication from the National Education Association (NEA) in which that organization announced its opposition to my amendment which would require school officials to obtain prior, written, informed consent whenever the school officials would have those parents' children subjected to a project, program, or course, the primary purpose or principle of which is to affect or alter the personal behavior or personal values of a student. Mr. President, I would like to point out the implication of the NEA's position. It is their position that as between the parent and the school official, the latter has the more fundamental right to determine whether the child should be subject to programs of behavior alteration and value modification.

Beneath such a position is a very serious threat to the traditional notion long respected by this Nation that it is the parents who are ultimately responsible for the welfare of their children. It borders on shocking that one of the national organizations representing educators would move to have the Senate oppose a reaffirmation of this important and real parental right. Further, the attempt to characterize the amendment as one which intends to curtail freedom of expression between child and teacher is incredible. It is more accurate to conclude that it is the NEA's position that the teacher should come between parents and child on such important matters as school programs, the primary purpose of which is behavior modification and values alteration.

I would respectfully suggest, Mr. President, that the burden to secure consent of the parent is not too great. Surely, most conscientious teachers would have no problem gaining the consent of a parent providing the teacher has demonstrated the worth of his proposal. To suggest otherwise is to insult the parent and underestimate the resources of America's educators.

Some may argue that my amendment will create too much additional work and redtape for schools and the educational bureaucracy. To that argument I must reply that I am not so much concerned about the workload or convenience of the educational bureaucracy but, rather, with the personal rights of America's children and their parents. I believe that their rights should properly take such priority in whatever educational legislation the Senate, in its wisdom, shall enact.

It has been argued that portions of my amendment would throttle innovation and virtually close down title III and other innovative educational efforts sponsored by the Federal Government. This is surely not the intent of my amendment, nor would it be the effect. My amendment simply gives individual parents the right to be informed about out-of-the-ordinary federally funded programs in which their child might participate, and assures the parents the right not to have their particular child participate if they find such a program objectionable. Granted that there will be some inconveniences and logistical problems involved in this. But what sufficient reason is there for anyone to stand up and say that parents must be denied these rights? What do the schools and the Federal agencies have to hide?

As a matter of fact, my amendment need not create undue problems. For example, the Russell Sage Foundation published a very thoughtful study in 1969 entitled, "Guidelines for the Collection, Maintenance, and Dissemination of Pupil Records," which included samples of simple forms that could be mailed to parents to obtain their permission for certain activities with regard to their children. I would also further note that many schools and a number of States already routinely require the prior consent of parents on a number of matters, including both special testing and some special programs or projects, such as drug programs or sex education.

Permit me to add, also, that many elements of my amendment follow the recommendations of the report of the Secretary's Advisory Committee on Automated Personal Data Systems at HEW, entitled "Records, Computers, and the Rights of Citizens."

Equally important as the other effects of my amendment is the likelihood that the obligation to inform parents will begin to close the gap of hostility that too often exists between parents and teachers, each distrusting the other. The increased openness and communication with parents on the part of the schools which would follow from my amendment would enhance parental interest and involvement in their children's education, and in the long run could lead to improved education and more harmonious school-community relations.

Mr. President, it is time for the U.S. Senate to take a stand in favor of, and to act to protect the rights and privacy of, parents and students where the Federal Government and Federal funds are involved. Therefore, I urge the Senate to give favorable consideration to my amendment.

I reserve the remainder of my time.

Mr. MATHIAS. Mr. President, will the Senator yield?

The PRESIDING OFFICER. Under the unanimous-consent request, the Senate must return to consideration of the Javits amendment.

Mr. JAVITS. I yield myself 2 minutes on the bill.

After discussion with Senator PELL, I wish to state the following facts: One, Puerto Rico is treated as a State in the House, so the amendment will be in conference. Two, we should figure out exactly what the relationship would be of the poor children who would be covered in Puerto Rico, which we will do, compared to the other States, and see, therefore, whether my estimate of something a little more than 2 percent, but not substantially over that, is justifiable. I want to check that out. Three, I now ask the Chair to make a ruling on this: Notwithstanding the fact that a substantive question may be affected, an amendment may occur at a later part of the bill, notwithstanding the adoption, if it should be adopted, of the McClellan amendment, which may make a substantive change, provided it does not cover the same language which is contained in the McClellan amendment -- whether another amendment, under the rules of the Senate, would lie at the end of the bill.

The PRESIDING OFFICER. So long as the amendment is redrafted, so long as it does not affect the text of the amendment, it would be in order.

Mr. JAVITS. Under those circumstances, Mr. President, I withdraw the amendment.

The PRESIDING OFFICER. The amendment is withdrawn.

Mr. MATHIAS. Mr. President, will the Senator yield?

Mr. PELL. Mr. President, we are on the Buckley amendment, with how much time on each side?

The PRESIDING OFFICER. The McClellan amendment is before the Senate at the moment. A unanimous-consent request would be in order to proceed to the Buckley amendment.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of the Buckley amendment, No. 1289.

The PRESIDING OFFICER. Without objection, it is so ordered.

Who yields time?

Mr. MATHIAS. Mr. President, will the Senator from New York yield me 3 minutes?

Mr. JAVITS. Yes, in opposition.

Mr. MATHIAS. I have some questions I would like to ask the distinguished junior Senator from New York, because I salute the thrust and the purpose which I think he seeks to accomplish by this amendment.

But I do want to be perfectly certain that I understand the practical effect of it. Turning to section 437(b) (1), page 3, I am wondering what effect this provision would have in the case of a student who was the victim of an accident in the school, or the victim of an accident on a playground. Would it prevent the school from arranging to have him immediately examined and medical treatment given to him?

Mr. BUCKLEY. No, of course not. Normal medical advice and hospital procedures usually require parental consent, and in those situations where the parents could not be contacted the treatment would be available.

Mr. MATHIAS. Would it not be necessary then, to have an exception because there is an exception in the general immunization, and I think the case of emergency treatment would have to be made in an excepted case or else the school would be under some jeopardy here.

Mr. BUCKLEY. I would be glad to ask unanimous consent to amend my amendment by inserting on line 11, page 3, following the word "immunization" the words "or emergency medical treatment."

The PRESIDING OFFICER. Is there objection to the Senator from New York modifying his amendment to that effect? The Chair hears no objection, and it is so ordered.

Mr. MATHIAS. If there were a course being given which is clearly a course which is causing the student to alter his behavior for the good, let us say in the matter of grooming, as the result of a course in civics, where he has become more interested in the system, and we have a course which Is a positive influence on the student's life, would the Senator's amendment require the parents' "prior, informed, written consent" for that type course?

Mr. BUCKLEY. Quite obviously in one sense all education has an effect on attitudes, and so forth. I believe there is a tacit rule of common sense that applies to the interpretation and application of all legislation and I speak of courses, the primary purpose of which is to modify behavior.

The PRESIDING OFFICER. The time of the Senator from Maryland has expired.

Mr. MATHIAS. Will the Senator yield to me for 3 additional minutes?

Mr. PELL. I yield.

Mr. BUCKLEY. So clearly the example of the Senator from Maryland would not be covered.

Mr. MATHIAS. Of course, my concern is that the language of the amendment might cover it. That is what gives me some uncertainty.

Let us pass to section 437(c) (1). Let us assume the unhappy possibility that a student is suspected of having bombed the chemistry laboratory and the FBI or another law enforcement agency comes into the school, let us say, without a judicial order. Would they be unable to examine the records or files of the student without the "prior, informed, written consent" of the student's parents?

Mr. BUCKLEY. I believe they should get a court subpena to have access to the records.

Mr. MATHIAS. The amendment does not even provide for access with a subpena without parental consent.

Mr. BUCKLEY. I refer to page 6, where it is stated:

In compliance with any court order, or pursuant to any lawfully issued subpena, if the parents and students are notified of any such order in advance of the compliance therewith . . .

Mr. MATHIAS. The Senator is correct but also it would require the warrant or the written consent, even in the case I suggested.

Now, I wish to ask the Senator this question. Does the provision allow the use of any identification device other than the names of students or the names of parents?

Mr. BUCKLEY. No, it does not.

Mr. MATHIAS. So that would be the only possible identification, there could be no other identification of any sort?

Mr. BUCKLEY. No.

Mr. MATHIAS. And the Senator feels that that is a useful provision.

Finally, there are certain programs in which there is some testing, specifically, HEW through the National Institute of Education has made a grant to test and experiment with an educational voucher program. I am sure the Senator is familiar that such programs are now underway in California and Vermont.

Under this provision if the parents of a child object to the child's participation, then that child would not be able to take part. Is that correct?

Mr. BUCKLEY. That is correct.

Mr. MATHIAS. What will happen to a program of that sort?

The PRESIDING OFFICER. The time of the Senator from Maryland has expired.

Mr. MATHIAS. Mr. President, will the Senator yield to me for 1 additional minute?

Mr. PELL. I yield 1 additional minute to the Senator from Maryland.

Mr. MATHIAS. What will happen to that child if the entire school is involved? What happens to that child when the whole school is involved, as in the case of California and Vermont? Does the child have to be withdrawn from that school and some alternative education provided?

Mr. BUCKLEY. That child would obviously be handled in the school as if he were not -- in other words, his State directly would pay for that tuition.

Mr. MATHIAS. Then, the Senator's concept is that under this provision --

Mr. BUCKLEY. It would not abort the experiment.

Mr. MATHIAS. But the child would have to have some other education provided in some other location or in some other manner.

Mr. BUCKLEY. If a parent did not want to accept the voucher the child would continue to be educated in the school he attended.

Mr. MATHIAS. But if the whole system were committed to the program, there would be no other school for him to attend. That seems to be the nub of the problem.

Mr. BUCKLEY. I disagree. I do not believe it would be interpreted in that way.

The PRESIDING OFFICER. Who yields time?

Mr. PELL. Mr. President, the junior Senator from New York and I have previously discussed this amendment. I ask unanimous consent that a letter from the National School Boards Association be inserted in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD as follows:

NATIONAL SCHOOL BOARDS ASSOCIATION
Evanston, Ill., May 2, 1974.

Hon. CLAIBORNE PELL,
U.S. Senate, Old Senate Office Building, Washington, D.C.

DEAR SENATOR PELL: Pursuant to his "dear colleague" letter dated April 26, 1974, Senator Buckley set forth proposed amendments to S. 1539 relating to "Protection of the Rights and Privacy of Parents and Students" (Sec. 513). In general, the National School Boards Association believes that the intent of the amendment is meritorious, but that operationally its accomplishment will generate unacceptable confusion because of the complicated legislative language and local administrative conditions associated with the approach taken in the amendment. We have been in contact with the Senator and he has some of our specific concerns under advisement. Those concerns are outlined below:

1. The amendment requires that parents have the right of access to their child's school files and that their consent be obtained prior to release of such files to third parties (with certain exceptions). However, if the rights of students are distinguishable from the rights of parents, and if the assertion of those rights should not be solely dependent upon parental willingness, the amendment should give students an independent right of access to, and consent with respect to the divulgence of, their files. At the same time, it may be advisable to impose a minimal age, such as 15 years, at which the child's independent rights would attach.

2. The amendment requires that school authorities provide parents with student files within thirty days after the request is made. In many instances, records may have to be screened in order to delete references to third persons, or the records sought may be stored in a central school district file or at the state level. Accordingly, while administrative foot dragging can not be condoned, compliance in many instances will not be possible unless the time limit is extended to 45 days -- and preferably 60 days.

3. Subsection (b) of the amendment provides that no student "participating in an applicable program" shall be required to undergo medical, psychological, et cetera, examinations without parental consent. This means that if a state or local agency is operating an examination program of that kind and is not receiving federal aid, consent is not required. But if the education agency is receiving ESEA II library funds, for example, then consent is required. The basis for this distinction is difficult to understand. Since the examination in question would be pursuant solely to a state program authorized and perhaps mandated by state law, federal legislation would be inappropriate in either case as a matter of policy. However, a different situation *may* arise when the education agency includes such an examination as part of one of its federal programs. If the latter situation is a proper area for federal involvement, then the overbreadth of subsection (b)(1) can be corrected if, after the words "no student," the words "participating in" are deleted and the words ", as a part of," are substituted in lieu thereof.

4. Subsection (b) of the amendment also prohibits the participation of any student in an applicable program which involves any research or experimental project without the consent of the student's parent. Research and experimental project is then defined as "includes but is not limited to, any program or project desired to explore or develop new or unproven teaching methods or techniques, or to explore or develop teaching techniques or courses affecting the social development, personal behavior, or values of the student." Given the broad brush of the above definition, quite conceivably almost any classroom effort would be subject to challenge on the grounds of "new" pedagogical style or personal impact upon particular students. But even at some point short of a literal application, the above definition will grind public education into a stultifying routine rather than the creative experience which it should present for children. And, to the extent any innovation is challenged there is some question whether the Department of Health, Education and Welfare will make nationally or community based judgments as to new techniques or definitions of student values. In either case it is also questionable whether the federal government can or ought to be involved in deciding questions relating to "social development, personal behavior, or values of the student." The requirement of individual parental consent to all programs raises other questions of federal policy. We now have federally mandated state advisory committees, local advisory committees, and even in some programs, school by school parental committees. That amendment adds yet another layer to the existing stream of administrative costs and formalities associated with school board policy implementation. One might begin to ponder the role of the taxpayer voter in our education system after one more review is added on top of the governmental structure which he elects to represent him. Although this restriction only applies to federal

programs (which in itself is perplexing, inasmuch that if restrictions on experimentation is the object sought, the source of funds should be irrelevant), that too is overboard. If such a restriction is really advisable, it should only be applied to ESEA Title III programs, which are designed for experimental purposes, and not to programs such as ESEA Title I or NDEA III, which are not intended to expose the child to innovative techniques on other than a random or incidental basis.

5. Subsection (c) requires parental consent for the release of personal data, except in certain instances, including the "order of administrative agencies having the power of subpoena." It would appear that a federal agency, which is so empowered, can by-pass the amendment merely by issuing a general order applicable to all students who, for example, attend a particular school, are involved in particular activities, etc. While investigations by federal officials may be necessary in certain circumstances, if the scope of the above exception is as broad as we suggest, then the basic purpose of the amendment is defeated.

6. Subsection (c) (4) of the amendment requires that a list of all persons or agencies desiring access to a student's records shall be maintained in that student's file. Although parents, students, and certain school officials should have access to that list, other persons or agencies should not -- lest the student be characterized by the innuendo of previous searchers of his files.

It should be mentioned that the financial costs of producing records, implementing parental consent procedures for innovation and divulgence of information, and maintaining information requests lists are subordinate to the primary objective sought by the amendment -- but should be taken into account nevertheless. Unfortunately, we do not have ample time to develop cost figures.

In summation, we urge that you withhold support for the amendment, unless the above described problems are resolved.

Sincerely,

AUGUST W. STEINHILBER,

Assistant Executive Director, Office of Federal Relations.

Mr. PELL. Mr. President, I am not enthusiastic about the amendment, but it does have some merit. Section (b) concerns me.

The amendment disturbs me in that it states that:

"No student shall be required to undergo ... testing without prior written consent of the student's parents in any project."

The thought I have is that if the Senator would withdraw that section (b), we could decide the fate of his amendment by voice vote, and my voice would be saying "aye" or if he insists on leaving it in, which from my side of the aisle I do not recommend, I would have to ask for a rollcall vote.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. PELL. I yield.

Mr. JAVITS. Under these circumstances the amendment could be taken to conference, but the administration has grave problems with other parts of it. Having reviewed the administration's wishes, I believe they would be susceptible to handling it in conference. However, I do not want my colleague to feel we have written letters of love that we are going to preserve all of it. I think the administration's suggestions do not change its fundamental thrust, but takes certain precautions. I hope in conference we can work it out that way.

Mr. STEVENS. Mr. President, will the Senator yield?

Mr. PELL. I yield.

Mr. STEVENS. Mr. President, I have serious questions about subsection (c) which I think runs contrary to a great many Federal policies and the best interests of the student. I intend to offer an amendment to either delete that section or to modify it substantially in several ways. I just want to let my friend from Rhode Island realize that I hope to have a chance to have an exchange with the Senator from New York concerning that.

As I understand subsection (c), it would prevent a high school from giving to a bank that wants to send out information about its loan program to students, the names and addresses of students without consent of the students' parents. I cannot understand this overprotectionism to the point that it could not offer to those students information about Federal loan funds. One could not get the names and addresses of students in one's State to get them the information of the opportunities available under the Federal student loan program.

Under subsection (c), if I were a probation officer, I could not sit down and talk with the teacher to get personal information from the teacher about the student who was subject to a criminal process. I do not know whether the Senator realizes how many cases go through the juvenile courts these days, but it is a fantastic number.

So I hope the Senator does not think this is going to breeze through without any debate.

Mr. BUCKLEY. Mr. President --

Mr. PELL. Mr. President, I yield to the Senator from New York, on his time.

Mr. BUCKLEY. Mr. President, I believe that argument is a paper tiger. We are talking about invasion of personal, private data. My amendment does not affect matters of public record, which may be names and addresses of people who happen to be students in a school.

Mr. STEVENS. Let me read from subsection (c):

"Permitting the release of records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization . . ."

Does the Senator interpret that to mean a bank could not say, "Give me the names and addresses of your graduating seniors?" Does the Senator interpret that to mean a probation officer could not get information from teachers or the files that would help a juvenile accused of a crime?

As prosecuting attorney, I can tell the Senator that probation officers need such information to help the students. I think this is a shotgun approach. I applaud the Senator's desire to protect students, but we are overprotecting in this way with regard to many activities in a school. I do not want to hurt any student, but we are not going to be able to help him with this amendment. That is the trouble with it.

Mr. BUCKLEY. I believe the parents have as much interest in protecting their child as does the Senator from Alaska, but the Senator is reading into the amendment the inclusion of the simple listing of names and addresses in a student's records and files.

Mr. STEVENS. I am happy to know that, but how does a probation officer go about getting that information? I saw a lot of probation officers as district attorney. If they were to have to go to busy juvenile court judges and subpena that information, or if they want to talk to teachers, they are not going to get it. I do not see the necessity for subsection (c). What is the necessity for it?

Mr. BUCKLEY. I described it in my statement. The fact that this information gets leaked out all over the place is injurious to the child. It haunts children in their later lives. I think we ought to put a stop to it.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 18 minutes remaining.

Mr. BIDEN. Mr. President, will the Senator yield me some time to ask the Senator from New York some questions?

Mr. BUCKLEY. Mr. President, I yield 5 minutes to the Senator from Delaware.

Mr. BIDEN. The Senator from New York, I think, should be complimented on this amendment. I think it is long overdue. I do not share the concerns of the Senator from Alaska. Having been a public defender, I do not think a probation officer should be able to sit down and talk with teachers about these matters. They think they are psychologists and psychiatrists, and they do more harm to the child than they help him. But my objection relates to subsection (b).

I am an early cosponsor of this amendment, but I think subsection (b) should be clarified so we understand what it would do. In that section it says:

"No student shall, as a part of any applicable program, be required, without the prior, informed, written consent of the student's parents, to participate in any project, program, or course, the primary purpose or principal effect of which is to affect or alter the personal behavior or personal values of a student, or to explore and develop teaching techniques or courses primarily intended to affect such behavior and values."

If that were to be misread, it could be a very, very restrictive section.

I would like, for the record, to ask a few questions.

Specifically, in a school for the deaf, will a project designed to test the effectiveness of a new audiology machine be termed "research and experimentation" under this amendment?

Mr. BUCKLEY. Certainly not. This is directed toward developing new, experimental educational techniques. Certainly, new devices for helping -- it is really a medical device -- the deaf to hear, or new research involving such things as "new math," traditional courses -- would not be affected at all by this amendment.

Mr. BIDEN. Would diagnostic tests given to students at the beginning of a course in order to gage the strengths and weaknesses of students in various academic disciplines be considered "research"?

Mr. BUCKLEY. No; this is normal research; it is not experimental. It is not research into new research activities.

Mr. BIDEN. So it is not intended to really alter the traditional academic disciplines? The Senator is not going after that?

Mr. BUCKLEY. That is correct.

Mr. ERVIN. Mr. President, will the Senator yield?

Mr. BUCKLEY. I yield.

Mr. ERVIN. This would prevent schools from making guinea pigs out of children and delving into their personal attitudes and their attitudes toward their families, as has been done in many schools throughout the United States. Is that correct?

Mr. BUCKLEY. Yes.

Mr. ERVIN. It is designed to prevent disclosure, except to those who are authorized to receive them, of personal data about these children. Is that correct?

Mr. BUCKLEY. The Senator is correct.

Mr. ERVIN. I am personally in favor of the proposal.

Mr. President, I am pleased to cosponsor the amendment concerning right to privacy and school records proposed by Senator BUCKLEY to S. 1539, the Elementary and Secondary Education Amendments of 1974. The issue of rights to privacy of public school pupils and their parents is one which has recently become highly publicized in many different circles, but it is a problem that has long been with us. The time has come to do something about it.

This amendment would accomplish several worthy objectives. It would give parents of public schoolchildren the right of access to their minor children's school records. Importantly, parents would be able to challenge any part of the contents of the records for their authenticity. The only persons having access to those records in addition to the parents would be school officials, the board of education, and officials at a school to which the pupil might be transferring. In order for any other person to have access to the records, the parents must give their written permission and the permission form would then become a part of the student's permanent record. In addition, no student could participate in any medical or psychological testing program without the prior, informed, and written consent of his parents. Parents of the pupils would be able to review any and all instructional materials that are used by their child's teacher.

One of the primary aspects of this new legislation is the provision stating that the schools, through the board of education, the principal, or the teacher, would bear the burden for informing the parents and students of their rights and for keeping them fully posted at all times of anything that would come within the scope of this legislation. The penalties for noncompliance with this act would be a loss of the Federal funds that had been made available to the school.

Much of the controversy concerning these school records centers around the use of classroom questionnaires that are financed by governmental grants, often the Department of Health, Education, and Welfare or a similar agency at the state or local levels of government. These questionnaires are thinly disguised as "research projects," although in actuality they often amount to highly objectionable invasions of the psychological privacy of schoolchildren. Oftentimes, the students are told that the responses they give are classified and will not be used for any other purpose than to gather and analyze statistical data on the educational situation In the public schools. However, it has been too often demonstrated that these data stand strong possibilities of being incorporated into computerized data banks or in other ways being disseminated to persons not connected with the educational process.

The questionnaires usually cover many aspects of the student's personal life and personality. The categories cover the student's attitudes toward his home and family, his school and teachers, his feelings about himself, and his feelings about his peers and classmates. It is my belief that no governmental agency has any business conducting such inquiries unless the parents of the children are made fully aware of the subject matter of the inquiry and subsequently give their full consent. The situation now is that children are rarely given a free and unprejudiced choice of answering or not answering the questionnaires. In addition, parents would be able to request to review their children's school records and would have the right to challenge any adverse content.

Mr. President, I intend to ask soon for unanimous consent that some of these questionnaires and summaries of questionnaires be reprinted in the RECORD. However, I do wish to read, for purposes of emphasis, some of the more offensive questions, although they are all certainly in that category. The examples that I use are from public schools in the States of Maryland and New Jersey, although there exists strong evidence that these unfortunate practices know no geographical boundaries. Practically all of the questions can be answered with a yes or no or multiple choice answer. There is no room for explaining an answer:

HOME AND FAMILY SITUATION

Are you an important person to your family?

Would you like to run away from home?

Are your parents strict or lenient?

Do you often argue with your parents?

What types of appliances, books, furnishings, and leisure facilities do you have in your home?

SELF-EVALUATION

Do you admire students who are bright?

Can you give a good talk in front of people?

Do you wish you were a different child?

Do you feel lonely very often?

Are you one of the last to be chosen for games?

Do you like being just what you are?

SCHOOLS AND TEACHERS

Are some students favored over others by your teachers?

Do most other students want to go to school?

Who are your three best friends (complete names)?

For what reasons have you been scolded in class?

How do you rate your teachers to other teachers at your grade level?

Do you ever miss school or a class simply because you do not wish to go?

Does a diploma from your school mean that you behaved yourself or that you really learned something?

PEERS AND CLASSMATES

Do you have many friends?

Does being with other children bother you?

Is it easy for you to make friends?

Do other children get you into trouble at school?

Would you rather play with friends who are younger than you or older than you?

I certainly believe that this is most important legislation and that the Congress should act wisely and in a forthright manner to recognize the rights to privacy of public school children and their parents. I am particularly impressed by the strong bipartisan support that this amendment has received from members of Congress and from many public and private sectors of our society. I urge the Senate to adopt this Buckley amendment to the Elementary and Secondary Education Act of 1974.

In my mind school officials should not be allowed to maintain any records outside of the reach of parents, much less records of such a personal nature as those that we have seen. A parent has every right to know exactly what information is being collected concerning his children, and the provisions of this amendment constitute what I feel are minimum considerations in the protection of that right. While the measures provided for are strong, I feel the seriousness of the issue well justifies the approach. The parent must have ultimate responsibility for the well being of his children. This amendment recognizes that responsibility.

Mr. President, I ask unanimous consent that the questionnaire from the Hackensack Public Schools of Hackensack, New Jersey, be submitted for reproduction in the RECORD. In addition, I ask unanimous consent that the transcript of a press conference held on April 19, 1974, by an organization known as Parents Who Care, based in Wheaton, Md., which recounts this problem in greater detail also be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HACKENSACK PUBLIC SCHOOLS,
Hackensack, N.J.

LEARNING EXPERIENCE MODULE -- FANNY MEYER HILLERS SCHOOL

STUDENT ATTITUDE INVENTORY

Name________________________

Boy____ Girl ___ LEM____ Grade___

Directions: Listen carefully to each question and decide how you think and feel. If you don't understand a question, ask about it. Answer each question by drawing a circle around either "yes" or "no."

Responses

Attitude Toward Home and Family: yes, 5; no, 3.

Attitude Toward Peers: yes, 5; no, 6.

Attitude Toward Self: yes, 12; no, 9.

Attitude Toward School and Teachers: yes, 13; no, 6.

School and Teachers

(Yes or No Answers)

1. Are your teachers interested in things you do at home?

2. Do your teachers give you work that is too hard?

3. Is the LEM a happy place for you to be?

4. Do you like to read at school?

5. When you don't understand something, are you afraid to ask your teacher?

6. Do you like to paint pictures at school?

7. Do you like to write stories at school?

8. Does your teacher help you with your work when you need help?

9. Do you like doing arithmetic problems at school?

10. Do you wish you were in a different class that was not in LEM?

11. Do you like to learn about science?

12. Does the LEM have too many rules?

13. Do you always have to do what the other children want to do?

14. Do you like the other children in the LEM?

15. Do your teachers like some children better than others?

16. Do other people at school really care about you?

17. Are you proud to be in the LEM?

18. Do you often get a chance to make decisions with others in your group?

19. Do you tell people that you like the LEM?

Self

(Yes or No Answers)

1. Do you often get sick at school?

2. Can you give a good talk in front of people?

3. Do you wish you were younger?

4. Do you wish you were older?

5. Do you often feel happy in school?

6. Are you a good reader?

7. Do you wish you were a different child?

8. Can you wait your turn easily?

9. Are you good in your schoolwork?

10. Are you a good child?

11. Are you one of the last to be chosen for games?

12. Do you feel lonely very often?

13. If you have something to say, do you usually say it?

14. Do you like the teacher to ask you questions in front of the other children?

15. Do the other children in the class think you're a good worker?

16. Do you find it hard to talk to your group?

17. Are most children able to finish their school work more quickly than you?

18. Do you often act silly just so people will pay attention to you?

19. Do you like most of the people you know?

20. Can you be depended on?

21. Do you like being just what you are?

Peers

(Yes or No Answers)

1. Do other children get you into trouble at school?

2. Do you have to do what the other children want to do?

3. Do you like the other children in the LEM?

4. Do other children in the LEM like you?

5. Do you always let other children have their way?

6. Do you have many friends?

7. Are other children often mean to you?

8. Do your friends usually do as you say?

9. Does being with other children bother you?

10. Is it easy for you to make friends?

11. Would you rather play with friends who are younger than you?

Home and Family

(Yes or No Answers)

1. Are you an important person to your family?

2. Do you have certain responsibilities at home?

3. Do you tell your family when you are mad at them?

4. Would you like to run away from home?

5. Is it pleasant to stay at home on days when there is no school?

6. Do you get upset easily at home?

7. Do brothers and sisters prevent you from being happy?.

8. Do your parents think school is important?

Statement by a Coalition of Concerned Parents from Eight Maryland Counties Representing Five Citizens Organizations on Invasion of Privacy by Maryland Public Schools

Good Morning: My name is Malcolm Lawrence. I am Director of Public Relations for Parents Who Care, a Montgomery County citizens group founded in October 1971. In addition to the Parents Who Care group, I speak today on behalf of individuals from seven other counties in Maryland representing four other citizens organizations.

I should like to introduce the other members of the group.

Mrs. Jean Carter, from Howard County, representing Citizens Advocating Responsible Education (CARE).

Mrs. Pat Dunlap, from Prince Georges County, representing Citizens for Community Schools (CCS).

Mrs. Margaret Kuhn, from Prince Georges County, representing Guardians for Traditional Education.

The remaining individuals represent the Maryland Committee for Public Disclosure in Education; they are:

Mr. James E. English, from Allegany County.

Mrs. Gloria Donohue, from Anne Arundel County.

Mrs. Betty Fahey, from North Baltimore City.

Mrs. Isabel Fox, from West Baltimore City.

Mrs. Rita Ann Ayd, from Baltimore County.

Mrs. Jo Ann Spriggs, from Carroll County.

Mrs. Barbara M. Morris, from Howard County.

I have a statement to make, following which we shall be happy to entertain questions.

The United States Constitution guarantees to the American citizen a number of fundamental rights that can not be infringed by the federal or state governments without compelling justification. These rights include the right to marry, the right to bear children and to maintain a family, the right to control one's own body, and the right to direct the upbringing of one's children.

The essence of these rights is that they are so basic to personal liberty that they merit a high level of protection from invasions by the state. The rights we have cited are sometimes described as "fundamental" or "natural" rights inherent in American tradition or Western values; sometimes they are based upon the 14th Amendment's guarantee of liberty or the 9th Amendment's reservation of rights to the people; in other cases such rights are based on common law principles. Whatever the basis, it is clear that parents, as part of their right to raise a family, retain basic decision-making authority and responsibility concerning their children's education that cannot be abridged by the states whether by direct exclusion of the parents or by indirect exclusion through the withholding of crucial information about their children.

We have called this press conference today to express publicly our strong objections to materials and practices in the public schools of the State of Maryland which we feel constitute invasions of privacy of both students and parents. It is our view that many teachers are similarly in opposition to these materials and practices, but are unwilling to openly denounce them for fear of reprisal or dismissal from the public school system. We are urging the Governor of Maryland to take immediate steps to safeguard the rights of students, the parents, and the teachers.

Our leading candidate for removal from Maryland public schools is an extensive questionnaire which has just been given to more than 7,000 students in Howard County. The questionnaire was given as part of a research project administered by the Center for the Social Organization of Schools at Johns Hopkins University, funded by a $200,000 grant from the National Institute of Education of the Department of Health, Education and Welfare (Contract No. NE-C-00-3-0114). Last year 7,200 students in grades 4, 5, 6, 8, and 11 were surveyed. This year, between February 1 and March 15, the same students were given a follow-up survey. For each class tested, a team of trained administrators from Johns Hopkins University marched in: the teacher was asked to leave the class; and the students were handed a 17-page questionnaire and told, "This is not a test. There are no right or wrong answers. Your answers will not be given to your teachers or anyone who knows you."

According to a December 1973 report of the Center for Social Organization of Schools, the Johns Hopkins study is designed to "investigate the effects of open environment schools on student reactions to school life, student self-reliance, student ability to make realistic judgments, and student achievement on standard tests of academic performance." A January 14, 1974 memorandum from the Howard County Superintendent of Schools to Directors, Supervisors, and Principals reported that three evaluating teams will operate in Howard County schools this year: the fifth year of a program being conducted by the University of Maryland, the project of Johns Hopkins University, and a study of the entire school system to be undertaken by the Institute of Field Studies of Columbia University. The Columbia study was described as a survey of data produced by the Maryland and Hopkins surveys, with the purpose of synthesizing these and other findings to come up with "recommendations for future development of the school system."

Three weeks ago, representatives from our groups called on the National Institute of Education to obtain more information on the scope of these projects and to learn where else these programs were either being undertaken or envisaged. The spokesman for the NIE did not shed any further light on the Johns Hopkins survey and refused to respond to the question as to whether NIE was also financing the University of Maryland and Columbia University projects.

I should like at this point to give the substance of a number of questions from the Johns Hopkins University survey. We have divided the questions into three general categories: 1) Family Situation, 2) Self-Evaluation, and 3) Feelings and Attitudes toward the School and Teachers.

First, Family Situation:

The student is asked how most decisions about him are made in the family.

How much a part he plays in the decisions.

How far in school his father went.

How far in school his mother went.

Whether his parents are strict or lenient.

If his parents want him to follow their directions even if he disagrees with their reasons.

Whether his parents often worry that he is up to something they won't like.

Whether his parents disapprove when he disagrees with them in the presence of their friends.

The student is asked whether he knows why he is supposed to do what his parents tell him to do.

Whether he has a lot of loud arguments with his parents about their rules and decisions regarding his activities.

And whether his parents treat him more like a little kid than an adult.

The student is asked if his parents have definite rules relating to the following activities:

The time to be in at night on weekends;
The time to be in on school nights;
Time spent watching television;
Going around with certain boys;
Going around with certain girls;
Eating dinner with the family;
Using the telephone;
Clothing;
Hairstyle;
Church attendance;
Household chores;
Returning home from school;
Smoking;
Age for starting to date;
Going steady; and
Frequency of dating.

The student is asked to answer YES or NO as to whether the following items are in his home:

Telephone;
Two telephones;
Vacuum cleaner;
Stereo hi-fi record player;
Air conditioner;
Electric dishwasher;
Your own family washing machine;
Your own family clothes dryer;
Dictionary;
Encyclopedia;

Daily newspaper;

Three or more magazine subscriptions;

Black and white TV;

Color TV;

Car;

Second car;

Two bathrooms;

Tape recorder;

Home movie projector;

Home slide projector;

Typewriter;

Piano; and

Skis or golf clubs.

The organizations represented here today consider these questions on the family situation to be clear invasions of privacy of the student and of the home by the school system. Whatever the purpose of the Johns Hopkins University questionnaire, we strongly protest against this type of probing into the personal affairs of the student and his family life.

Let us turn next to the category of self evaluation in the Johns Hopkins questionnaire:

Here, the student is asked whether he pretends to be busy in class when he is really just wasting time.

Whether being popular with other people his age is more important than anything else to him.

If someone often has to tell him what to do.

If he admires students who are very bright.

When he doesn't know the answer, if he will try to fake it rather than say he doesn't know.

Whether he will usually give in because he doesn't want to upset his friends.

If he is known as a person who will dare to be different.

If he knew the teacher was not going to collect his homework, whether he would do his best.

Whether he gets blamed for things that are not really his fault.

The student is asked if the best way to get ahead in life is to be nice to all people.

Whether he likes to be by himself because he has a lot of things he likes to do alone.

Whether he feels uncomfortable if he disagrees with what his friends think.

If the student sometimes feels angry when he doesn't get his way.

If it would be hard for him to face the "cold, cruel world."

If he can say "No" when his friends call him to do something with them.

He is asked whether he will put off leaving his home and friends for as long as possible.

If he didn't like the way things were going in a group, whether he would hesitate to tell the leader.

Whether he really cares if some people don't want to be friends with him.

Whether he tries to get out of doing work , and hopes no one will find out.

If he prefers to let other people in a group make the decisions.

It is our view that this line of self-evaluation, self-analysis, self-criticism, and confession is pure and simple an invasion of psychological privacy of the child. Student of all ages are asked to direct their thoughts to introspection and unwittingly lay bar their inner-most feelings to the data collection for whatever purpose he may wish to make use of them.

Our third and final category of the John Hopkins test deals with feelings and attitudes toward the school and teachers:

The student is asked if he feels lost in school.

If he feels the tension build up in him when he is in school.

If he often does not know what he is supposed to do.

Whether most of his teachers want him to do things their way and not his own way.

Whether his teachers tolerate a lot of questions during a lesson.

If certain students in his classes are favored by the teachers more than the rest.

If the teachers in his school often act as if they are always right and he is wrong.

Whether he is considered weird when he gets involved and excited in his classwork.

If he daydreams a lot in class.

Whether he wants to go to school.

Whether he ever does anything exciting in class.

If he counts the minutes until the class ends.

Whether he sits on the floor in many of his classes.

Whether most other students want to go to school.

If a diploma from his school means more that you behaved yourself than that you really learned something.

He is asked if he and his teachers are: (1) on the same wave length, (2) on the same planet, (3) somewhere in the same solar system, or (4) in two different worlds.

If his classwork is: (1) great stuff, (2) good stuff, (3) OK, or (4) dull stuff.

How he would rate the ability of most of his teachers compared to teachers in other schools at his grade level: (1) far above average, (2) above average, (3) average, (4) below average, or (5) far below average.

If he and the school are: (1) good friends, (2) friends, (3) distant relatives (4) strangers, or (5) enemies.

The student is asked to provide the full names of his three best friends.

And also the full names of students in the following categories:

Very popular with other students;

Independent;

Hard to fool; and

Fools around in class instead of working.

The student is queried as to whether he was ever scolded in class for:

Fooling around;

Not paying attention;

Fighting in class;

Talking back to teachers;

Not handing in enough work;

Telling off a teacher; and

Shouting or laughing out loud.

If he ever stayed away from school just because he didn't want to go: (1) never, (2) 1 or 2 days, (3) 3 to 5 days, or (4) more than 5 days.

Whether he has ever cut classes just because he didn't want to go to them: (1) never, (2) 1 or 2 classes, (3) 3 to 5 classes, or (4) more than 5 classes.

A lot of the questions in the Johns Hopkins survey relating to student feelings and attitudes toward school and teachers are simply absurd and a sheer waste of time and resources. Perhaps the most ridiculous question is the one asking students to rate teachers in other schools at the same grade level. Leaving aside the ability of a young student to evaluate his teachers, how could he be expected to compare them with teachers in other schools whom he has neither seen nor heard? A good many of the queries are negative in tone; in our judgment they foment inner frustrations in the students and create student animosity toward the teachers and the particular school attended. As I have indicated, the regular classroom teacher is not involved in this test and is therefore unable to respond or even know about the criticisms by the students. But the most damaging questions in this category are those which extract self-incriminating information from the students themselves on truancy, insolence, and other improper activities in school. Self-confession by students on such things as fighting in class and telling off the teacher provide an evaluation team with data to be entered into a permanent personality record classifying students as maladaptive, aggressive, anti-social, emotionally disturbed, and predelinquent.

The Johns Hopkins test may have run its course for this year with the students, but the survey continues for teachers and parents. We are asking that this project be withdrawn forthwith and prevented from spreading to other counties in the State of Maryland.

Our second candidate for removal from Maryland public schools is a questionnaire currently being administered to 50 classes in 26 elementary schools in Montgomery County. This survey, which is being financed by the Spencer Foundation, is designed to gain insight into students' motives and goals and likes and dislikes. In addition assessment of the children's educational growth, with both standard academic measures and some non-academic measures, will be made toward the end of the school year. According to an explanatory letter to parents by a psychologist with the Psychological Services Department of the Montgomery County Public Schools system, "characteristics of the classroom environment will be assessed by observers in a series of several visits during the year." The information gained by this project will be sent out of State and fed into computer data banks for use in diagnosing and prescribing the handling of students.

Some sample questions from the Spencer Foundation survey are:

If your parents tell you you're acting silly and not thinking clearly, is it more likely to be : (a) because of something you did or (b) because they happen to be feeling cranky?

Suppose your parents say you aren't doing well in your school work. Is this likely to happen to you: (a) because your work isn't very good or (b) because they are feeling cranky?

If your parents tell you that you are bright and clever, is it more likely: (a) because they are feeling good or (b) because of something you did?

The students are asked to answer a number of "I think I am" questions, circling the appropriate degree to which they are:

Able to get along with other kids;
Not able to figure things out in school;
Scared to take chances;
A good worker in school;
Happy with myself;
Not as smart as other kids in school;
Trying my best in school;
Not the way I would like to be;
Sure of myself;
Doing poorly in school; and
Angry with myself.

The complaints and concerns of the organizations represented here today are by no means limited to specific surveys, such as those financed by the National Institute of Education and the Spencer Foundation. We are opposed to all abuses by the schools of the right to privacy, the right to be left alone. It so happens that the school administrative personnel and the social researchers in the State of Maryland have found a veritable gold mine in grants, contracts, and techniques that are turning public school children into a collection of guinea pigs who are constantly being battered with questionnaires, personality tests and a variety of other inquisitions which are clearly invasions of privacy of both the student and the home.

To cite one widespread example, the Maryland State Board of Education Bylaws call for a compulsory treatment of subject matter known as Interpersonal Relationships. No child in public schools in the State of Maryland may be excused from these discussions and classroom activities, which are interspersed throughout the curriculum from kindergarten through the 12th grade. Under this program, children must be subjected to all types of probes into their psyches and family situations. Here in Montgomery County, for example, elementary school children are forced to participate in the following material and questions:

Discuss family size, pointing out advantages of both large and small families.

Role play the family at dinner.

Role play an increase in conflicts with parents.

Role play other meaningful family situations.

Have children keep records of their activities; note those children who seem to be overburdened with responsibilities.

Have children write paragraph about being afraid; encourage them to verbalize their fears due to dark places, being hurt, dreams or nightmares, personal loss, experience with death, punishment, and the unknown.

Have children observe their family for a week; have them jot down notes on the way love was shown.

Have children write examples of times when they felt angry, afraid, shy.

Have role playing situations based on these experiences.

Here are some sample questions:

What kind of things make you angry?

What do you like to do when you are alone?

Should you expect to be paid for chores done at home?

Whom does your family entertain at your house?

How do you cooperate with your family?

What happens when and if you refuse to cooperate?

Do you think you are being treated fairly?

Do you think you would like to live and work alone?

What do you expect of your father and mother?

Under what circumstances have you felt unloved, unwanted, lonely, shy, or fearful?

As these examples from the K-through-6 curriculum demonstrate, the

Interpersonal Relationships approach emphasizes negative attitudes; it dwells on fears, death, sorrows, anxieties, and other personal feelings and the interrelationship of these factors with parents and the home situation. The student -- particularly the younger child -- has a weak defense against such techniques and can easily be induced to yield to classroom pressure or forced to work his imagination overtime for the sake of satisfying the teacher's demands.

Such prying by the schools into the home and into parental authority can be a most dangerous business. In Montgomery County, the School Board recently (August 27, 1973) approved an expanded definition of child abuse, under which teachers are asked to make official reports to the police and the social services authorities on children who have been "denied normal experiences that produce feelings of being loved, wanted, and secure." These are labeled as children, who have been subjected to so-called "emotional neglect." Moreover, teachers are required to submit a report on any child who is "over worked" by his parents or exposed to "continuous friction in the home." Whatever the charge, the school system policy stipulates "if there is any doubt or question in reporting such cases, it should be resolved in favor of the child."

It can, of course, readily be appreciated by one and all that the questions in the compulsory Interpersonal Relationships curriculum as well as a good many of the questions in the Johns Hopkins survey could provide data which may well be diagnosed incorrectly or misinterpreted by the social scientists as child abuse or child neglect cases. Moreover, many children could be labeled as what the social engineers like to call "disadvantaged children." We parents are most disturbed over this kind of role being assumed by the public schools. The schools were established in the United States to provide a service to the parents and taxpayers. The schools, therefore, work for us; not the other way around. The teachers, who in our view are thrust into and trapped in the middle of the situation, have an equally valid and justifiable complaint.

Whatever the stated goal of the educators and the social planners, the whole question of labeling children and predicting their behavior on the basis of questionnaires and classroom confessions is being challenged by parents and legal authorities throughout the United States. An important question is: Who has access to the data? Another, how will the data be used? An even more important question might be: What are the values and attitudes of the evaluators? The Congress of the United States is very much concerned with all of these questions. And we here today, who speak for five citizens organizations with representation from eight Maryland counties, feel that the Maryland State public officials should be similarly concerned.

Therefore, by letter of April 19, 1974, we are strongly urging the Governor of Maryland to take steps to remove the Johns Hopkins University survey, the Spencer Foundation survey, and all similar tests and activities from the public schools of Maryland and to charge the Maryland State Board of Education with the task of reviewing all curriculum and practices in the classrooms for the purpose of removing those parts which violate the rights of the students and the parents as guaranteed by the Constitution of the United States of America. We are saying to the Governor "Enough is enough." We are asking him to remove the inquisitions of the master social planners from our public schools and to ensure us that our educators will concentrate, instead, on the basic concepts of education which our tax dollars were intended to finance, and education that will assist and prepare our children to face a mature, real world.

Mr. BIDEN. Mr. President, is the parliamentary situation such that I still have a few minutes of the time yielded to me by the Senator from New York?

The PRESIDING OFFICER. The Senator was yielded 5 minutes. One and a half minutes of that time still remain.

Mr. BUCKLEY. Mr. President, I yield 2½ minutes to the Senator.

Mr. BIDEN. I have one question. In subsection (b) (2), does the Senator have any objection to removing the words "or principal effect" on line 19, page 3 where it reads "the primary purpose or principal effect of which * * * "?

Mr. BUCKLEY. No, I do not. I think that would be very helpful. I thank the Senator from Delaware for suggesting it.

Mr. President, I ask unanimous consent that the three words at the end of line 19 on page 3 be eliminated.

The PRESIDING OFFICER. Is there objection? Without objection, the amendment is so modified.

Mr. BIDEN. I have no further questions of the Senator. He has indicated to me, in private and in the colloquy, that this is intended to go only to those programs which would be considered experimental. I think the single most burning issue before the country is the invasion of privacy at all levels. School records are private. No one should have access to them unless it is with the consent of the parents.

I am glad to be a co-sponsor of the amendment.

Mr. HART. Mr. President, would the Senator yield for 1 minute?

The PRESIDING OFFICER. Who yields time to the Senator from Michigan?

Mr. PELL. I yield 1 minute. Which side is he on?

Mr. HART. I guess my honest answer is that I do not know which side I am on. I wish we had had a study or report on it. To say that the programs for research and experimentation are to be prevented unless the parents say OK is something unique and not really in the nature and order of the evolving educational techniques, when, on page 4 it is stated:

> As used in this subsection, the term "research or experimentation project" means any project or program which is a part of an applicable program and which is authorized by an administrative officer of an education agency, a State or local education agency, or any education institution, including preschools, except that research or experimentation projects shall not include projects in the field of reading . . .

Maybe that is visual education. I do not know.

It seems to me that the definitions excludes experimentation on anything except speech and language. However, this is but one example of the difficulty I have and that other Senators have in considering and understanding the reach of the bill without hearings. Of course, everyone is for protecting privacy; that is great. However, what do we do with experimentation?

Mr. BUCKLEY. Mr. President, I should like to address myself to the remarks just made. First of all, the amendment explicitly excludes reading and bilingual education. However, some parents might choose to have their child take those subjects. They do not destroy the educational apparatus of this program. They do not destroy the ability to develop a program with cooperative parents. If a program is so alarming to the average parent that no parent will cooperate, then we should examine the program to see whether that program should be in effect. I do not believe that the remarks dealing with such affairs would be justified.

Mr. HART. Mr. President, what about the new math, which I still do not understand, but to which my children have been exposed? Could I say "no" if we were to adopt this amendment?

Mr. BUCKLEY. That is not at all the situation. A normal person would agree to experimentation with new math.

We are not talking about educational disciplines or perhaps new textbooks or new apparatus, or anything else along that line. We are talking about new departures from teaching methodology.

Mr. MATHIAS. Mr. President, if the Senator would yield me a minute to pursue that line of inquiry, as much as I want to share that concept. I share with the Senator from Michigan some lack of comprehension as to whether it will do this. The Senator from Michigan raises a question about new math or any other method of teaching a new subject. What about the question I asked earlier as to whether this amendment would prevent any identification symbol? If students cannot be identified in a statistical sense, how can we make any kind of longitudinal studies as to whether a new teaching program on any subject is successful? How do we evaluate Programs? How do we make any judgments beyond the isolated case of one student at a time?

Mr. BUCKLEY. Mr. President, schools are quite capable of evaluating the experience with students which they have in their own classes. I see no difficulty at all. Again, I think the Senator is emphasizing that the amendment is not destroying the ability of programs or research to go forward in the case of experimental programs.

All the amendment requires is no identification, and then the parent has the right to withdraw the child. He does not need to consent in advance. In general, the premise is that parents are generally responsible adults, having prime responsibility for their children. I have no doubt that they would act responsibly.

The PRESIDING OFFICER. Who yields time?

MR. PELL. Mr. President, I yield myself 5 minutes.

I think the junior Senator from New York knows of the regard and high respect I hold for him. As much as I would like to see the Senator succeed in his proposal as he explains it, we are con-cerned here not with what the Senator from New York intends the language he proposes to accomplish. It is what the language would do.

This is what bureaucrats in future years will rely on, what the language in the bill is.

They will not look up the debate on the floor at the time of passage of the bill. However, the language of the bill reads specifically:

"Parents should be informed in advance and in writing of the participation of their child in any research program which is part of a school program * * * parents of such child objects to participation."

I believe that this language says that if there is to be a new experimental program of learning new math, or a psychological program, or something of that sort, every parent must be informed in writing. We should consider the postage and redtape involved. It would kill most new programs.

I hope the Senator from New York might be willing to withdraw at least subsection (b). I wonder what the wishes of the Senator might be in that regard.

Mr. BUCKLEY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BUCKLEY. Mr. President, is it not possible to have a division ordered so that we could vote on section (b) alone?

The PRESIDING OFFICER. If it is in the pending provision, the answer is yes.

Mr. BUCKLEY. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. On whose time?

Mr. DOMINICK. Mr. President, will the Senator withhold that request for just a moment?

Mr. BUCKLEY. Mr. President, I withhold my suggestion of the absence of a quorum.

Mr. DOMINICK. Mr. President, I want to ask the Senator, not about section (b), because I must say that I share my compatriot's concern over that. But on section (c) I have been very active since I became a member of the Education Subcommittee in trying to make the program available for children who are going from high school to college or graduate school.

It looks to me as though what we have done under subsection (c) is to prevent whatever institution might be seeking the records of a youngster concerning his personality to determine whether he is eligible (a) either for a loan, or (b) for a work-study program, or (c) for a well deserved and perhaps not fully qualified minority student, as to his ability to get this background without the consent of the child's parents. He may be trying to get away from the parents, who may be lushes, and he may be trained to get away from them.

Mr. BUCKLEY. I would point out that the amendment states that --

"Whenever a student has attained eighteen years of age, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student."

Mr. DOMINICK. Mr. President, I understand that. However, I would presume that the Senator from New York or any Senator, as well as the Senator from Colorado, went to college when he was 17. A great number of children go to college when they are 17.

All I can say is that I think this is just a roadblock. It is something which I do not think the Senator from New York wants to do, in which we are trying to promote this subject and are not trying to restrict it.

I think that what the Senator is driving at in section (c) is the relief of a group of people who are trying to make some kind of psychiatric research program, totally devoid of the educational process in order to get their master's thesis or write something for the Brookings Institution, or something of that kind.

I am afraid that the language goes much further than that kind of restriction.

Mr. BUCKLEY. I find it implausible that parents would not cooperate in helping a child qualify for financial help.

Mr. DOMINICK. Well, they would not hesitate if he were going to be bringing the financial help back home, but I know a great number of people who do not give a whoop whether their children go to college, graduate school, or anything else; in fact, they would prefer they did not, and if he is trying to get a loan all of a sudden which they may ultimately be called on to repay, they may say no.

Mr. BUCKLEY. I point out to the Senator from Colorado that on page 6, line 12, we make an exception for financial aid.

Mr. DOMINICK. That is true. I had not seen that. Does that apply to all of subsection © ?

Mr. BUCKLEY. Yes, it does.

Mr. DOMINICK. That helps materially. I will go back to the drawing board.

Mr. BUCKLEY. I thank the Senator. Mr. President, in an attempt to make this amendment as acceptable as possible, I would make at this time, in response to some of the concerns expressed by the Senator from Maryland and the Senator from Michigan, the following modification: On page 4, line 13, to add in, as an exception in the definition of experimental programs, after the words "bilingual education," the words "or for the development of new techniques for the teaching of traditional disciplines." I ask unanimous consent that I may so modify my amendment.

The PRESIDING OFFICER. Without objection, the amendment will be so modified.

Mr. PELL. Mr. President, reserving the right to object, I could not hear. What was the modification?

Mr. BUCKLEY. On page 41 line 13, after the word "education," I insert the words "or for the development of new techniques for the teaching of traditional disciplines."

The PRESIDING OFFICER. Without objection, the amendment is so modified.

Mr. PELL. Mr. President, I will not object to the modification, but this will be the fourth modification made on the floor. I really think this matter should be considered in the committee. I shall be compelled to vote against it, but I do not object to the modification.

Mr. BUCKLEY. May I now ask the Presiding Officer whether the Parliamentarian has made a determination as to whether section (b) would stand on its own?

The PRESIDING OFFICER. (Mr. TUNNEY). Section (b) is written in such a way that it is independent and is divisible.

Mr. BUCKLEY. Under those circumstances, Mr. President, and on condition that the sponsor will accept the balance of the sections -- Mr. President, if I may have the attention of the distinguished manager of the bill -- I am willing to ask for a division, so that we may vote separately on section (b), provided the manager will accept the remainder of the amendment.

Mr. PELL. I would ask for a rollcall vote on subsection (b), and as far as section (c) goes, I would ask my colleague from Alaska whether he has any objection.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. On whose time?

Mr. PELL. To be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. PELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PELL. This procedure would be acceptable, and I am perfectly willing to have either a voice or a division vote on sections (a), (c), and (d).

Mr. BUCKLEY. Mr. President, before asking for a division, I ask unanimous consent to have printed in the RECORD a statement prepared by the Senator from Arizona (Mr. GOILDWATER) in support of this amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATEMENT BY SENATOR GOLDWATER

PARENTAL AND STUDENT RIGHTS

Mr. President, it gives me great pleasure to join with my good friend from New York, Senator Buckley, and others of my colleagues, in sponsoring an amendment to protect the right of privacy of school children and their parents. I have a particular interest in the amendment because it would legislate in the education field certain, basic safeguards for the right of personal privacy which I have been trying to get enacted for over a decade.

Subsection (a) of our amendment would provide statutory confirmation of the right of parents to see the contents of their own children's school records. Parents would also be guaranteed a right to challenge information in their child's school records and to correct any inaccurate or misleading data. This is identical to the safeguards standards which are included in S. 2810, a bill which I have introduced regarding the privacy and accuracy of personal data systems of all types.

Subsection (b) of our amendment would create a system of parental consent which would give parents a right of control over "personality" tests given to their children in the public schools. This provision is identical to legislation which I first introduced thirteen years ago, in 1961. In the early '60's, I was concerned that the new Federal authorities for direct funding of educational programs, which were just getting underway, would allow Federal monies to be spent for testing programs in which school children could be used as involuntary "guinea pigs" in experimental programs unrelated to the true purposes of education.

Needless to say, Mr. President, I was shocked to learn of the existence of surveys being conducted in our public schools which probed the most intimate personal aspects of the lives of school children and their relationships with their parents and families. I was especially surprised to discover one survey, financed with Federal funds, which consisted of some two hundred questions being asked of Junior High School students ranging in age from 11 to 14 years.

These questions inquired of the student:

"Is your father fairer about punishment than your mother?

Did you "steal more than $2 from your parents?"

Did you "fight physically and bodily with an adult relative?"

The student was also asked to reveal to the school whether he or she had "gone further than petting with a person of the opposite sex."

In addition, the student was asked to rate his or her own family. The student was required to give a yes or no answer, for example, to these questions:

"I wish my family had nearly as much money as the families of many of my classmates."

"Are the children in your family punished more severely than in other families?"

"I wish my father and mother were better educated, like the parents of many of my classmates."

Mr. President, these questions were just a few of the two hundred questions that were actually being asked of American school children in a questionnaire financed in part by Federal funds granted by the Department of HEW.

Yet, I was told it wasn't done. I was told it couldn't be done. On the one hand, I was informed that such questions were not permitted under the administrative interpretations of the Department. On the other, I was advised that leading "experts" believed that my amendment "would greatly inhibit much-needed educational research . . . ."

So there you have it, Mr. President. The agency told me that my amendment was not needed because it would duplicate their own policy interpretations; but that if it was put into law, it would impair research that the bureaucrats wanted to allow to go on. I never could make sense out of this, but the Department's view prevailed and the Senate rejected my amendment.

Mr. President, perhaps the climate of this country has caught up with the wishes of ordinary parents and ordinary school children. Perhaps the concept of the personal freedom of the average citizen and his family has grown to the point where Congress is willing to be the guardian of his privacy against prying and inquisitive minions of the bureaucracy.

Mr. President, our public schools have no compelling need for psychological and personality tests which pry into the private lives of a captive audience of school children. Even if the child is not specifically told that he is required to answer these tests, it would be a rare and unusual child who would dare to defy the authority of a school by refusing on his or her own initiative.

Questions of this kind are an intolerable invasion of the right of privacy. They exemplify the ever-watchful eye of "Big Brother" spying into the most personal thoughts and habits of American families, and doing it, by abusing the trust of innocent school children.

Moreover, Mr. President, these types of questions are calculated to raise doubts, suspicions, and hostility in the minds of our children toward their own parents and a skepticism about the basic moral principles of our society. In this sense, these tests could be used by governmental planners for purposes of influencing or conditioning the social and political thinking of our youth, and through them, American society.

Mr. President, the time to preserve what is left of our personal privacy is now. Sufficient thought and action must be given to the problem while there is still some measure of personal liberty left to cherish. It is for us today to determine just how much freedom shall remain for the individual in the future. I implore my colleagues to vote for the Parental and Student Rights Amendment.

Mr. President, I include the junior high school student survey which was conducted in the early, 1960's, in part with Federal grants:

JUNIOR HIGH SCHOOL SURVEY SUPPORTED BY GRANTS FROM THE U.S. PUBLIC HEALTH SERVICES AND THE UNIVERSITY OF KANSAS (1961)

FACTS ABOUT YOURSELF

Please answer all questions completely.

5. How old are you? (Check only one answer.)

(1) _ 11 years or younger.
(2) _ 12 years old.
(3) _ 13 years old.
(4) _ 14 years old.
(5.) _ 15 years old.
(6) _ 16 years old or older.

6. Sex::

(1) _ Boy.
(2) _Girl.

7. What grade in school are you now in?

(7) _ Seventh grade.
(8) _ Eighth grade.
(9) _ Ninth grade.

8. Are you (check only one answer) -

(1) _ An only child?
(2) _ The youngest child in your family?
(3) ___ The oldest child in your family?
(4) _ Neither the youngest nor the oldest child?

9. How many living brothers and sisters do you have?

(0) _ None.
(1) _ One.
(2) _ Two.
(3) _ Three.
(4) _ Four.
(5) _ Five or more.

10. What was the highest grade your father finished in school?

(1) _ Eighth grade or less.
(2) _ Some high school.
(3) _ Finished high school.

PART I. RULES WE ALL BREAK

The questions in part I are about more personal things concerning you and your friends. Do you put your name or address on this questionnaire. We want to assure *you* that your answers will be kept completely *secret* and *confidential*. No one will ever know how you answered any of the following questions. We encourage you to be completely honest with your answers.

For the purpose of this study, we are interested in the things you have done during the *last 2 years only*.

11. Damage or disfigure furniture in schools, such as chairs, tables, and desks:
(1) _ No.
(2) _ Yes.

12. Steal goods from warehouses or storage houses:
(1) _ No.
(2) _ Yes.

13. Damage cemetery property:
(2) _ Yes.
(1) _ No.

14. Damage or destroy public signs or road markers:
(1) _ No.
(2) _ Yes.

15. Steal automobile parts such as hubcaps, mirrors, ornaments, etc.
(1) _ No.
(2) _ Yes.

16. Kicked, bit or scratched a student of about your own age:
(3) _ Three or more times.
(2) _Twice.
(1) _ Once.
(0) _ Never.

17. Get out of going to school by writing a fake excuse for yourself:
(2) _ Yes.
(1) _ No.

18. Steal or siphon gasoline from cars, trucks, or other kinds of vehicle equipment:
(2) _ Yes.
(1) _ No.

19. Damage or destroy mailboxes:
(1) _ No.
(2) _ Yes.

20. Steal more than $2 (money) from your parents:
(2) _ Yes.
(1) _ No.

21. Puncture or cut automobile tires, bike tires:
(1) _ No.
(2) _ Yes.

22. Steal materials or equipment from buildings that are being constructed:
(2) _ Yes.
(1) _ No.

23. Kicked, scratched or bit an adult relative (mother, father, guardian, or uncle, for example) :
(0) _ Never.
(1) _ Once.
(2) _ Twice.
(3) _ Three or more times.

24. Damage or destroy toys or games that belonged to persons your own age:
(1) _ No.
(2) _ Yes.

25. Steal from buildings that are being torn down:
(1) _ No.
(2) _ Yes.

26. Tied a person up with rope, string, or wire to a tree or similar object and then left them that way:
(0) _ Never.
(1) _ Alone.
(2) _ With one or more others.
(3) _ Both alone and with others.

27. Steal things from your parents that were worth more than $2:
(2) _ Yes.
(1) _ No.

28. Teased severely, hurt or killed a cat or dog:
(1) _ Alone.
(2) _ With one or more others.
(0) _ Never.
(3) _ Both alone and with others.

29. Scratch the paint on someone's car on purpose:
(1) _ No.
(2) _ Yes.

30. Steal more than $2 (money) from your brothers or sisters:
(2) _ Yes.
(1) _ No.

31. Skip school with one or more friends or classmates:
(2) _ Yes.
(1) _ No.

32. Steal articles of clothing worth more than $5 from clothing or department stores:
(1) _ No.
(2) _ Yes.

33. Become so mad or angry that you threw things at or hit a teacher or principal or other school official:
(3) _ Both alone and with others.
(0) _ Never.
(1) _ Alone.
(2) _ With one or more others.

31. Steal a bicycle from anyplace other than a place that sells bicycles (like from neighborhoods, school grounds, or public places where bikes may be parked):
(2) _ Yes.
(1) _ No.

35. Remove spark plugs or wires from cars:
(1) _ No.
(2) _ Yes.

36. Steal a car for joyride without the owner's knowledge or permission:
(2) _ Yes.
(1) _ No.

37. Break or crack windows in automobiles:
(1) _ No.
(2) _ Yes.

38. Skip school with three or more friends or classmates:
(2) _ Yes.
(1) _ No.

39. Steal articles of clothing worth less than $5 from clothing store or department store:
(1) _ No.
(2) _ Yes.

40. Damage flowerbeds or gardens on purpose:
(2) _ Yes.
(1) _ No.

41. Steal gasoline from gas stations, farms, or other private places:
(1) _ No.
(2) _ Yes.

42. Taken part in fights where knives or switchblades were used:
(1) _ No.
(2) _ Yes.

43. Steal a bicycle from a store that sells or repairs bikes:
(2) _ Yes.
(1) _ No.

44. Skip out of certain class periods, but not the whole day, without permission (like gym class or student assemblies):
(2) _ Yes.
(1) _ No.

45. Fought physically and bodily with an adult relative such as mother, father or aunt (that is, fought in anger or

fear, not in sheer fun) :
(0) _ Never.
(1) _ Alone.
(3) _ Both alone and with others.
(2) _ With one or more others.

46. Steal things (not money) from your brothers or sisters that were worth more than $2:
(2) _ Yes.
(1) _ No.

47. Get out of school early by pretending to your teacher that you were sick or not feeling well:
(2) _ Yes.
(1) _ No.

48. Steal anything because an adult asked you to steal it:
(1) _ No.
(2) _ Yes.

49. Beat up a person much older than yourself in a fight:
(0) _ Never.
(2) _ With one or more others.
(1) _ Alone.
(3) _ Both alone and with others.

50. Steal more than $2 (money) from your friends or classmates:
(2) _ Yes.
(1) _ No.

51. Damage parking meters on purpose (break glass, jam slot):
(1) _ No.
(2) _ Yes.

52. Steal jewelry worth more than $2 from jewelry, department, dime or drug stores:
(2) _ Yes.
(1) _ No.

53. Skipped school or stayed out of school without a genuine excuse for more than 1 day:
(1) _ No.
(2) _ Yes.

54. Damage or break coin machines of any kind on purpose:
(1) _ No.
(2) _ Yes.

55. Damage or ruin personal clothing of classmates or other schoolchildren:
(1) _ No.
(2) _ Yes.

56. Get out of going to school by pretending to your parents that you were sick:
(2) _ Yes.
(1) _ No.

57. Steal more than $2 (money) from candy, coke, or cigarette machines:
(2) _ Yes.
(1) _ No.

58. Leave home with intention of going to school, but just never making it to school (without a good reason):
(1) _ No.
(2) _ Yes.

59. Injured or hurt someone not in your family, but arranged matters so that someone else got the blame:
(1) _ Alone.
(2) _ With one or more others.
(3) _ Both alone and with others.
(0) _ Never.

60. Steal more than $2 from school:
(2) _ Yes.
(1) _ No.

61. Leave school early without permission:
(2) _ Yes.
(1) _ No.

62. Try to "get by" without paying the bill in restaurants, cafes, soda fountains:
(1) _ No.
(2) _ Yes.

63. Skip school by yourself without good excuse from parents:
(2) _ Yes.
(1) _ No.

64. Taken part in a gang fight against another gang or against one or two other persons:
(1) _ Once.
(2) _ Twice.
(3) _ Three or more times.
(0) _ Never.

65. Steal things from inside of parked cars:
(1) _ No.
(2) _ Yes.

66. Break windows on purpose in vacant homes, garages, or other buildings:
(1) _ No.
(2) _ Yes.

67. Damage or destroy anything because someone "dared" you to do it:
(1) _ No.
(2) _ Yes.

68. Steal things worth more than $2 from food stores:
(2) _ Yes.
(1) _ No.

69. Damage school property other than chairs, tables, and desks:
(1) _ No.
(2) _ Yes.

70. Curse or use obscene language in speaking to a teacher or other school official:
(2) _ Yes.
(1) _ No.

71. Steal anything and then sell it to an older teenager or adult:
(1) _ No.
(2) _ Yes.

72. Damage or destroy anything that belonged to another person, in order to "get even" with that person:
(1) _ No.
(2) _ Yes.

73. Steal money from public telephones or parking meters:
(1) _ No.
(2) _ Yes.

74. Hit or strike a teacher, coach, or other school official:
(2) _ Yes.
(1) _ No.

75. Take part in fights where BB guns, air-pellet guns, or slingshots were used:
(1) _ No.
(2) _ Yes.

76. Tease or embarrass someone by stripping or taking his or her clothes off?
(2) _ Yes.
(1) _ No.

77. Damage or destroy anything "just for the heck of it:"
(1) _ No.
(2) _ Yes.

78. Steal less than $2 (money) from candy, coke, or cigarette machines:
(2) _ Yes.
(1) _ No.

PART II. ALONE OR WITH OTHERS

Instructions -- We are interested in how certain rules are broken. Some people break rules only when they are with others, some break rules only when they are alone, and other persons. For each item, *check the box that applies to you.* If it does not apply to you, leave that item blank.

In the last 2 years, did you:

	Only when alone (1)	Only when with other persons (2)	Both alone and with other persons (3)
11. Steal hubcaps, mirrors, etc from cars			
12. Puncture or cut tires, convertible tops, scratch the paint on cars			
13. Tie a person up with rope or string and left them that way			
14. Tease, hurt, kill harmless animals			
15. Steal clothing worth less than $5			
16. Steal a car for a joyride			
17. Beat up a person much older than you			
18. Damage or break coin machines			
19. "Get by" without paying the bill in cafes, soda shops, movies, other events			
20. Damage school property on purpose			
21. Steal things in order to sell them			
22. Damage or destroy road markers, signs, mailboxes, street lights			
23. Steal anything worth more than $5 but less than $50			
24. Beat up an adult for his money			
25. Steal anything worth $50 or more			
26. Break into and enter a locked store, gas station, or other buildings			

PART III. YOUR SOCIAL ACTIVITIES

Instructions. -- In this section are statements about what some boys and girls do most of the time in their time after school and on weekends. Read each statement and decide whether it fits you or does not fit you as you are right now or during this year. If the statement is true of you, that is, if you would say *"Yes"* to the statement, put a No. 1 next to it. If the statement is not true of you, that is, if you would say *"No"* to the statement, put a No. 2 next to it.

Be sure to read and to answer each statement with a 1 or a 2. If it fits you fairly well but not exactly, put a 1.

Answers -- Put 1 for a *"Yes."* Put 2 for a *"No."*

27. I spend a lot of time with one special friend who is not a member of my family. --

28. I stick pretty much to myself. --

29. I never disobey my parents. --

30. I spend a lot of time with one friend at a time, although I have several close friends. --

31. I spend a lot of time with two or three friends. The group of us play together. --

32. I do some talking about or listening to talk about sexual matters when I am with my friends. --

33. I play with a large group of four or more children in or near my home neighborhood. --

34. I mostly play alone or with my brothers or sisters. --

35. I belong to a group that is often chased after by some adults such as storekeepers, police, or homeowners. --

36. I never catch cold in the winter or spring. --

37. I play with friends my parents do not like. --

38. I never tell lies. --

39. I often share secrets and ideas or hopes with my friends. --

40. I have taken part in kissing and necking while on a date or while alone with a person of the opposite sex. --

41. Most of my friends are my own age or between 11 and 14. --

42. I have never spent a night in a detention home or jail. --

43. Most of my friends are 2 or 3 years older than I am. --

44. I have petted with a person of the opposite sex while on dates or when we were alone. --

45. Most other boys and girls like me. --

46. I try to get other boys and girls to like me. --

47. I have gone further than petting with a person of the opposite sex. --

48. I care a great deal about what other boys (or girls) think of me. --

49. I want to be different somehow from others in my own age group. --

50. I have answered ads in comic books or other magazines which advertised pictures, photographs, or stories about sexual matters. --

51. I like most of all to spend my free time alone. --

52. Some of my friends do not like the way I act. --

PART IV. LEISURE ACTIVITY AND FAMILY LIFE

Instructions. -- The statements in this section are like those in the section you just completed. But these have to do with how you spend your spare time and how you are treated by your parents.

Read each statement. If it applies to you as you are right now or have been during this year, mark the statement with a 1 for a *"Yes."* If it does not apply to you, mark it with a 2 for a *"No."*

The statements. -- Write 1 for a *Yes*, and 2 for a *No.*

53. Do you spend more of your free time with your friends than with your family? --

54. Do you go to dances more than once a month? --

55. Do you go out with your mother or father more than once a month?

(Movies, dining, social events, etc.)? --

56. Is your father fairer about punishment than your mother?

57. Do you study schoolwork at home less than five times a week? --

58. Is your mother fairer about punishment than your father? --

59. Do you work at a part-time job once or more a week? --

60. When you do something extra, do your parents reward you with praise or special privileges or with money? --

61. Do you help around the house doing chores almost every day? --

62. When you have done something wrong or "bad" do your parents try to reason with you? --

63. Do you usually attend at least one movie a week? --

64. Are some children in your family punished more severely than others? --

65. Do you spend time after supper at a local hangout (drugstore, soda shop, bowling alley, etc.) at least two times a month? --

66. Do your parents get all the facts before they punish you? --

67. Do you usually have one or two dates a month or more? --

68. Are the children in your family punished more severely than in other families? --

69. Do you think that your friends have better ideas than your parents do about what a young person should do in his spare time? --

70. Do you usually spend three or more evenings a week away from home?

71. Are the children in your family ever punished when they do not need it?

72. Does your father punish you when your mother does not think you should be punished? --

73. Would you like to spend more of your free time with your friends than your parents now allow? --

74. Does your mother punish you when your father does not think you should be punished? --

75. Do you feel your mother punishes you fairly? --

76. Do you feel your father punishes you fairly? --

77. Below is a line that stands for your *grades* or *marks* in school this year, thinking of them lumped together. Make only one check (✓) where you best fit.

"A" or best possible, 100.
"B" or high, 90.
"C" or average, 80.
"D" or below average, 70.
"F" or failing, 60.

PART V. GUESSING CAUSES

Instructions. -- Reprinted below is a news story that appeared not long ago in the Kansas City Star. After you read the story carefully, pretend that you are talking the story over with some school friends. None of you knew the boy in the story directly or indirectly, but you are all *guessing* about why he did what the police claim he did. Then the questions that follow the story, indicating what your guesses would probably be. (Names and places in the story have been added or changed.)

The story

The Kansas City Police last night arrested Walter Stevens, age 13, who was caught by Police Sergeant Daniels. Daniels charged the boy with stealing coins from the coin machine and washing machines in the Whirlaway Laundromat. The policeman said he saw Stevens pry open the coin slots on the machines and remove quarters and dimes. He had $15 in coins in his pocket when arrested.

The boy's mother, Mrs. William Stevens, said she thought her son was at work at his part-time job in the nearby Roll Em Bowling Alley. He had worked there 2 nights a week for 2 months, she said, and had been earning about 60 cents an hour. The boy's father, William Stevens, 48, is a clerk in the central post office. He works the night shift and was away at the time of the arrest.

Walter Stevens is a seventh grade student at Wiltmore Junior High School. The Wiltmore principal, Mr. John Savage, reported that young Stevens had been doing very poorly in school for several months and said that he had been expelled once for breaking school property and had often skipped school.

When interviewed, young Stevens told this reporter that his father had to work such long hours that he was very seldom home and that his mother was often ill and had to remain in bed. He claimed, "Nobody at school understands me or tries to help me."

Instructions. -- Now check the statements below that you think provide the best possible explanations for why Walter Stevens did what he did. Remember that these are guesses and that all of them may be true or all may be false.

Put a 1 if you agree, and a 2 if you disagree.

11. Walter wanted to get more money than he could earn at his job in order to help his poor parents. --

12. Walter was lonely and unhappy at school, where no one understood him.

13. Walter was raised by bad standards and had not been taught properly what was right and wrong.

14. Walter had everything against him. He was bound to get into trouble when everything at school and at home went wrong.

15. Walter was fired from his job at the bowling alley but didn't want to worry his mother, who needed the money he had been giving her. --

16. A gang of young boys managed by a professional thief had organized stealing from laundromats and other service stores, and Walter had fallen in with this gang through his acquaintances at the bowling alley. --

17 Walter liked to steal and had probably been stealing one thing and another for several years before he was caught. --

18. Walter was sick, mentally or physically, but no one at school or at home understood this and helped him. -

19. Other children at school had been selfish and unkind in the past and had kept Walter from building any friendships. His loneliness led him to steal. --

20. Older boys in a gang really broke the coin machines and did the stealing, but they left Walter, who thought they were his friends, when they heard the police car and dumped the coins into his pocket. --

21. Walter's parents had never taken him to Sunday School, where he could have learned what is right and wrong. --

22. Walter wanted to find a way to get decent clothes and money for an allowance. His parents could not give him these things, but he needed them to try to make friends at school. --

PART VI. WISHES

Below are listed some wishes that have been expressed by boys and girls in other junior high schools. Read each wish carefully. Then check the wish with an X if you feel it is a wish that you have made or thought about any time during this year. If the wish does not fit you, leave it blank.

Check (X) here

23. I wish I could buy my lunch in the cafeteria more often. --

24. I wish I could afford to go to the movies as often as many of the others in my school. --

25. I wish my family could take me on vacation trips like those that many of the persons in my school have enjoyed. --

26. I wish I were able to dress as well as most or many of the persons in my school. --

27. Many of the students in my class will get to go to college some day, but I probably won't get the chance. --

28. I wish I were physically better built or more attractive --

29. I wish I were as attractive to the opposite sex as many of my schoolmates.

30. I wish I could join the Boy or Girl Scouts like many of my classmates. --

31. I wish my parents were more understanding, like the mothers and fathers of many of my classmates. --

32. I wish my family had nearly as much money as the families of many of my classmates. --

33. I might like to be an engineer or a scientist when I grow up, but I probably will not get the chance. --

34. I won't have as good opportunities when I grow up as many of my classmates. --

35. I wish my parents were not so strict with me, and more like the parents of many of my classmates in this way. --

36. I wish my parents were a little more strict with me, like the parents of many of my classmates. --

37. I wish my father and mother were better educated, like the parents of many of my classmates. --

38. I wish my father had as good a job as many of my classmate's fathers. --

39. I wish I could go on dates the way many of my classmates do. --

Now write down one wish that you have felt strongly about this past year.

PART VII. SOCIAL VALUES AND FEELINGS

Please answer each question by making a check in the space next to agree or disagree. There are no right or wrong answers. Just report your opinion.

40. Watching television programs such as "Sugarfoot" and the "Donna Reed Show" and "Dobie Gillis" is boring or dull and a waste of time:

(0) _ Agree.
(1) _ Disagree.

41. Having a coke in a drugstore with other boys and girls after school or on a week end is dull and a waste of time:

(0) _ Agree.
(1) _ Disagree.

42. Watching school athletic contests is boring and a waste of time:

(0) _ Agree.
(1) _ Disagree.

43. Watching school basketball or football games is fun:

(0) _ Agree.
(1) _ Disagree.

44. Television programs such as "Cheyenne" and "National Velvet" and "Lassie" are fun to watch:

(0) _ Agree.
(1) _ Disagree.

45. The people who get the best jobs when they grow up are usually the people who have friends who do favors for them, rather than the people who are best trained or educated:

(0) _ Agree.
(1) _ Disagree.

46. Teachers give their praise and recognition to the students who find a way to become their special favorites, whether these students are good workers in school or not:

(0) _ Agree.
(1) _ Disagree.

47. Most teachers do not really like to help students:

(0) _ Agree.
(1) _ Disagree.

48. Teachers give their praise and recognition to the students who work the hardest and learn the most:

(0) _ Agree.
(1) _ Disagree.

49. The popular children in any school are the ones who have earned the respect and admiration of other students:

(0) _ Agree.
(1) _ Disagree.

50. Teachers have such different ideas about what you are supposed to learn in school that it is impossible to get a clear idea of what is best:

(0) _ Agree.
(1) _ Disagree.

51. People nave such different ideas about what is right and wrong that you can't even get clear ideas on this question:

(0) _ Agree.
(1) _ Disagree.

52. Once some teachers decide that a certain boy or girl is "bad" or a "trouble-maker," there is nothing you can do to change their minds:

(0) _ Agree.
(1) _ Disagree.

53. Teachers can usually tell quite well who is learning a lesson and who is not:

(0) _ Agree.
(1) _ Disagree.

54. Most parents have very clear ideas about how their children should act on dates and about matters like kissing:

(0) _ Agree.
(1) _ Disagree.

55. People in any town have a lot to say about how their town government is run:

(0) _ Agree.
(1) _ Disagree.

56. The children and adults in any town can help the police do a good job of enforcing the law:

(0) _ Agree.
(1) _ Disagree.

57. Students in junior high schools never have any say or influence in what they are taught in their classes,

(0) _ Agree.
(1) _ Disagree.

58. So many other people voted in the national election last fall that it didn't matter to me whether my parents voted or not.

(0) _ Agree.
(1) _ Disagree.

59. If a group of children decide they do not like you, there is nothing much you can do to change their minds:
(0) _ Agree.
(1) _ Disagree.

PART VIII.

WAYS OF DISCIPLINING YOUNG PEOPLE

Below are various ways by which many parents discipline children and young people. *Please answer each question by checking the choice which best tells how your parents have disciplined you during the last 2 years.* Answer each question for your mother and your father separately.

Do your parents take away your allowance?
61. Father:
(0) _ Never.
(1) _ Very seldom.
(2) _ Sometimes.
(3) _ Frequently.
62. Mother:
(0) _ Never.
(1) _ Very seldom.
(2) _ Sometimes.
(3) _ Frequently.

Do your parents refuse to speak to you?
63. Mother:
(1) _ Very seldom.
(2) _ Sometimes.
(3) _ Frequently.
10) _ Never.
64. Father:
(2) _ Sometimes.
(0) _ Never.
(3) _ Frequently.
(1) _ Very seldom.

Have your parents slapped you or given you spankings?
65. Mother:
(3) _ Frequently.
(2) _ Sometimes.
(3) _ Never.
(1) _ Very seldom.
66. Father:
(2) _Sometimes.
(3) _Frequently.
(1) _Very seldom.
(0) _Never.

Do your parents forbid you to do something that you were especially planning on doing?
67. Father:
(3) _ Frequently.
(2) _ Sometimes.
(0) _ Never.
(1) _ Very seldom.
66. Mother:
(3) _ Frequently.
(2) _ Sometimes.
(0)_ Never.
(1) _ Very seldom.

Do your parents tell you to leave home, or to find a new home if you can't be better?
69. Mother:
(1) _ Very seldom.
(2) _ Sometimes.
(0) _ Never.
(3) _ Frequently.
70. Father:
(2) _ Sometimes.
(0) _ Never.
(3) _ Frequently.
(1) _ Very seldom.

Do your parents spank you with a stick, belt, hairbrush, or things other than their hands?
71. Mother:
(1) _ Very seldom.
(0) _ Never.
(3)_ Frequently.
(2) _ Sometimes.
72. Father:
(0) _ Never.
(3) _ Frequently.
(2) _ Sometimes.
(1) _ Very seldom.

Do your parents take away some special privileges?
73. Mother:
(2) _ Sometimes.
(3) _ Frequently.
(0) _ Never.
(1) _ Very seldom.
74. Father:
(2) _ Sometimes.
(3) _ Frequently.
(0) _ Never.
(1) _ Very seldom.

Do your parents say they don't love you or warn you that they will stop loving you?
75. Father:
(3) _ Frequently.
(2) _ Sometimes.
(0) _ Never.
(1) _ Very seldom.
76. Mother:
(2) _ Sometimes.
(3) _ Frequently.
(1) _ Very seldom.
(0) _ Never.

Have your parents beat you up (using their fists, etc.)?
77. Father:
(2) _ Sometimes.
(0) _ Never.
(3) _ Frequently.
(1) _ Very seldom.
78. Mother:
(3) _ Frequently.
(2) _ Sometimes.
(1) _ Very seldom.
(0) _ Never.

Mr. PELL. Mr. President, I ask for the yeas and nays on section (b). The yeas and nays were ordered.

The PRESIDING OFFICER. Do Senators yield back their time?

Mr. STEVENS. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. STEVENS. Is this amendment still open to amendment?

The PRESIDING OFFICER. Is the amendment open to amendment?

Mr. STEVENS. Yes.

The PRESIDING OFFICER. The Senator from New York has requested the division of his amendment, and section (b) will be voted on separately. All the rest will be voted on by voice vote first.

Mr. STEVENS. Is it in order to submit an amendment to delete subsection (c) at this time.

The PRESIDING OFFICER. That would be in order now.

Mr. STEVENS. I send such an amendment to the desk.

The PRESIDING OFFICER. Have the Senator from New York and the Senator from Rhode Island yielded back their time?

Mr. PELL. My recollection is not acute on that. What does the RECORD show?

The PRESIDING OFFICER. Does the Senator yield back his time?

Mr. PELL. I yield it back.

Mr. BUCKLEY. I yield back the remainder of my time.

The PRESIDING OFFICER. The clerk will state the amendment of the Senator from Alaska.

The assistant legislative clerk read as follows:

On page 4, line 14, delete subsection (c).

Mr. STEVENS. Mr. President, I again applaud what the Senator from New York is trying to do, but I think any proposal that has to have so many amendments on the floor to try to perfect the original intent is a measure that should not be passed.

Subsection (a) is a good subsection. Subsection (d), as I read it, on protection of personal data, gives the Secretary and the schools the right to protect personal data under any regulations that are necessary to control the use, dissemination, or protection of such data.

Subsection © is not necessary, and what is more, again I point out that it would harm the students. It would prevent those with legitimate interests from going to a school and getting the information that is necessary. It would prevent the Senator from New York from deciding to recommend a student for some national award without going and telling him, if he was over 18. One would have to have his consent, to get any information from his record.

It would prevent a probation officer -- notwithstanding the argument of my good friend from Delaware, I still have faith in the probation system, and I think the probation officer ought to be able to go in and get the information necessary not only when a student is subject to a juvenile proceeding, but in order to continue the work that he has to do during the period before a juvenile is sentenced. Many times they have to keep up with what they are doing. It is a probation officer's duty to find out what he is doing in school, or whether he is attending school. This would even prevent a probation officer from getting attendance data. I cannot understand us putting such a cloak of secrecy around a student.

On the other hand, subsection (c), as I understand it, gives the school authorities complete authority to adopt appropriate regulations. That would be subject to the Administrative Procedures Act. Everyone concerned would be involved in a hearing.

This has not been the subject of hearings by committee, and I do not think it is the kind of thing that ought to be passed on the floor of the Senate without further consideration. Therefore, to save time, I ask the deletion of that section.

I yield back the remainder of my time.

Mr. PELL. Mr. President, I think there is merit in what the Senator from Alaska says, and I would vote the same way. I yield back the remainder of my time.

Mr. BUCKLEY. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDING OFFICER. Does the Senator from Rhode Island yield back his time?

Mr. PELL. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER (Mr. NUNN). All time has now been yielded back --

Mr. ERVIN. Mr. President, a parliamentary inquiry. What are we voting on?

The PRESIDING OFFICER. On the amendment of the Senator from Alaska (Mr. STEVENS) to strike section (c).

Mr. BUCKLEY. Mr. President, I do not believe I yielded back my time yet.

The PRESIDING OFFICER. On the Stevens amendment, the Senator from New York does not have any time.

Mr. STEVENS. Mr. President, I ask unanimous consent that the Senator from New York (Mr. BUCKLEY) may have 5 minutes to respond. I think that is only fair.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request of the Senator from Alaska? The Chair hears none, and it is so ordered.

Mr. BUCKLEY. Mr. President, if the distinguished Senator from North Carolina (Mr. ERVIN) wants to address himself to that point, I yield to him to do so.

Mr. President, I would merely say that the area addressed by the Senator from Alaska (Mr. STEVENS) is but one area. Probation reports have also been leaked to the FBI, and other files as well. This is an area of extreme sensitivity. I do not believe that, absent appropriate court orders, this information should be made available.

Mr. ERVIN. Mr. President, section (d) as I understand it, provides that --

> The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary . . .

I do not see any objection to protecting the privacy of children. I do not see that they should be made guinea pigs by social scientists. That is why I support the bill.

Mr. STEVENS. Mr. President, with all due respect to the distinguished Senator from North Carolina, my amendment is to delete section (c), not (d).

Mr. BUCKLEY. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. All time on this amendment has now been yielded back.

The question is on agreeing to the amendment of the Senator from Alaska (Mr. STEVENS) to strike section (c).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. FULBRIGHT), the Senator from Alaska (Mr. GRAVEL), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Hawaii (Mr. INOUYE), the Sena-tor from Utah (Mr. MOSS), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Alabama (Mr. SPARKMAN), the Senator from Texas (Mr. BENTSEN), and the Senator from Missouri (Mr. SYMINGTON) are necessarily absent.

I further announce that, if present and voting, the Senator from West Virginia (Mr. RANDOLPH) would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT), the Senator from Kentucky (Mr. COOK), the Senator from Florida (Mr. GURNEY), the Senator from New York (Mr. JAVITS), and the Senator from Illinois (Mr. PERCY) are necessarily absent.

I also announce that the Senator from Nebraska (Mr. CURTIS), and the Senator from Arizona (Mr. GOLDWATER) are absent on official business.

I further announce that, if present and

voting, the Senator from Nebraska (Mr. CURTIS) would vote "nay."

The result was announced -- yeas 35, nays 49, as follows:

[No. 194 Leg]

YEAS -- 35

Aiken
Bayh
Bible
Byrd, Robert C.
Cannon
Clark
Cotton
Dominick
Eagleton
Griffin
Hart
Hartke
Haskell
Hathaway
Huddleston
Jackson
Kennedy
Magnuson
McGee
McGovern
McIntyre
Metcalf
Metzenbaum
Nelson
Nunn
Packwood
Pell
Proxmire
Ribicoff
Stennis
Stevens
Stevenson
Taft
Talmadge
Williams

NAYS -- 49

Abourezk
Allen
Baker
Bartlett
Beall
Bellmoll
Biden
Brock
Brooke
Buckley
Burdick
Byrd, Harry F., Jr.
Case
Chiles
Church
Cranston
Dole
Domenici
Eastland
Ervin
Fannin
Fong
Hansen
Hatfield
Helms
Hruska
Hughes
Humphrey
Johnston
Long
Mansfield
Mathias
McClellan
McClure
Mondale
Montoya
Muskie
Pastore
Pearson
Roth
Schweiker
Scott, Hugh
Scott, William L.
Stafford
Thurmond
Tower
Tunney
Weicker
Young

NOT VOTING -- 16

Bennett
Bentsen
Cook
Curtis
Fulbright
Goldwater
Gravel
Gurney
Hollings
Inouye
Javits
Moss
Percy
Randolph
Sparkman
Symington

So Mr. STEVENS' amendment was rejected.

Mr. CRANSTON. Mr. President, the Senator from New York (Mr. BUCKLEY) has proposed an amend-ment regarding the confidentiality of student records and requiring parental consent for certain school activities that causes me some concern.

The first portion of the amendment seeks to guarantee the right of access and review of a student's school records, by parents and by students - -if 18 years of age or over -- and prevent the disclosure of such records to most third parties without parental or student consent.

I would wholeheartedly support this portion of the Senator's amendment. It seems to me that it seeks to preserve a right to confidentiality of records of student academic and personal performance that should be guaranteed. I would point out, however, that in my State of California, this right of access and review is presently guaranteed under the California Public Records Act.

The section of the amendment that deals with "Parental consent," however, causes me serious concern.

First, I question the advisability of the Congress enacting legislation that, in effect, would thwart a State's compulsory attendance laws. Under this amendment, a parent may refuse to have his child attend a class if, after notification, the parent finds the content of the course or activity to be objectionable. While I do not object to "Parental consent," I do question Federal interference in what I believe to be a question that should be decided by locally elected school officials, rather than the Federal Government.

Second, subsection (b) (2) of the amendment would require parental consent for students -- and I quote:

"To participate in any project, program, or course, the primary purpose or principal effect of which is to affect or alter the personal behavior or personal values of a student, or to explore and develop teaching techniques or courses primarily intended to affect such behavior and values."

Mr. President, this language is breathtaking in its sweeping generalities. How do you determine in advance, and provide notification to the parent, of classroom activities that might bear on the values of a student? A course in American history, for example, that discusses contemporary American ethics in the light of Watergate could be construed as tending to "affect the personal values" of a student. Or, how do you go about discouraging violent or overly aggressive behavior without tending to "alter the personal behavior" of a student?

These are serious questions, Mr. President, that we cannot take lightly. Because the penalty for even accidental transgression of these Federal directives is the total loss of Federal funding to any educational institution -- public or private, preschool through postsecondary -- that is found "out of compliance."

Finally, Mr. President, the amendment directs the Secretary of Health, Education, and Welfare with the responsibility for -- and again, I quote:

"Investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints."

Frankly, I question the wisdom of charging a Federal agency with the power to probe the questions that would have to be probed in order to investigate complaints of alleged violations of the act. Such questions could include:

Was the purpose of the course to affect the values of the child, or were they affected accidentally, or at all?

Even if the purpose of the course was not to alter the values of the child did it have the effect or altering the values of the child?

What were the values of the child before they were "altered?"

Mr. President, I believe my point is obvious: This section of the Senator's amendment brings the Federal Government and its agencies dangerously close to deciding issues of academic and personal freedom that should be in the bands of local and State school officials, and the people who elected them, not the Federal Government.

I do not believe the Senate of the United States should take any action that could be legitimately construed as having the primary effect of circumventing local control of curriculum and school practices, discouraging innovation, or stifling educational reform.

For these reasons, and because I support the major premise of the Senator's amendment, I would hope he would consider deleting the section of the amendment to which I have referred.

The PRESIDING OFFICER. The question now occurs on the first part of the amendment of the Senator from New York.

Mr. PELL. The vote is now on section (b), is it not? What is the parliamentary situation?

The PRESIDING OFFICER. The question now occurs on all of the amendment except section (b).

The amendment was agreed to.

The PRESIDING OFFICER. The question now occurs on section (b) of the amendment. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

Mr. MANSFIELD. Mr. President, what are we voting on?

The PRESIDING OFFICER. On section (b) of the Buckley amendment.

The second assistant legislative clerk proceeded to call the roll.

Mr. ERVIN. Mr. President, precisely what is this?

The PRESIDING OFFICER. The roll call is now in progress.

Mr. HUMPHREY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The question is on the adoption of section (b) of the Buckley amendment.

Mr. HUMPHREY. Up and down on section (b)?

The PRESIDING OFFICER. That is correct.

The question is on the adoption of section (b) of the Buckley amendment.

The clerk will call the roll.

The second assistant legislative clerk resumed and concluded the call of the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Texas (Mr. BENTSON), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from Alaska (Mr. GRAVEL), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Hawaii (Mr. INOUYE), the Senator from Utah (Mr. MOSS), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Alabama (Mr. SPARKMAN), and the Senator from Missouri (Mr. SYMINGTON) are necessarily absent.

I further announce that, if present and voting the Senator from West Virginia (Mr. RANDOLPH) would vote "nay."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT), the Senator from Kentucky (Mr. COOK), the Senator from Florida (Mr. GURNEY), the Senator from New York (Mr. JAVITS), the Senator from Oregon (Mr. PACKWOOD), and the Senator from Illinois (Mr. PERCY) are necessarily absent.

I also announce that the Senator from Nebraska (Mr. CURTIS) and the Senator from Arizona (Mr. GOLDWATER) are absent on official business.

I further announce that, if present and voting, the Senator from Nebraska (Mr. CURTIS) would vote "yea."

The result was announced -- yeas 40, nays 43, as follows:

[No. 195 Leg.]

YEAS -- 40

Baker
Bartlett
Beall
Bellmon
Brock
Buckley
Byrd, Harry F., Jr.
Byrd, Robert C.
Chiles
Church
Dole
Domenici
Eastland
Ervin
Fannin
Fong
Griffin
Hansen
Helms
Hruska
Huddleston
Johnston
Mansfield
McClellan
McClure
Metcalf
Montoya
Nelson
Pastore
Pearson
Proxmire
Roth
Scott, Hugh
Scott, William L.
Stennis
Taft
Thurmond
Tower
Weicker
Young

NAYS -- 43

Abolorczk
Aiken
Allen
Bayh
Bible
Biden
Brooke
Burdick
Cannon
Case
Clark
Cotton
Cranston
Dominick
Eagleton
Hart
Hartke
Haskell
Hatfield
Hathaway
Hughes
Humphrey
Jackson
Kennedy
Long
Magnuson
Mathias
McGee
McGovern
McIntyre
Metzenbaum
Mondale
Muskie
Nunn
Pell
Ribicoff
Schweiker
Stafford
Stevens
Stevenson
Talmadge
Tunney
Williams

NOT VOTING -- 17

Bennett
Bentsen
Cook
Curtis
Fulbright
Goldwater
Gravel
Gurney
Hollings
Inouye
Javits
Moss
Packwood
Percy
Randolph
Sparkman
Symington

So section (b) of Mr. BUCKLEY'S amendment (No. 1289) was rejected.

Mr. PELL. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. EAGLETON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. DOMINICK. I yield to the Senator from California.

The PRESIDING OFFICER. The Senator from California is recognized.

Mr. DOMINICK. Mr. President, I yield to the Senator from Missouri.

Mr. EAGLETON. Mr. President, I ask unanimous consent that James Murphy and Marsha McCord be accorded the privileges of the floor during consideration of the education bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

Mr. CURTIS. Mr. President, on behalf of the distinguished junior Senator from New York (Mr. BUCKLEY) I ask unanimous consent that a number of articles and press releases relating to the Family Educational Rights and Privacy Acto of 1974, of which I was a cosponsor, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD as follows:

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

Caspar Weinberger, secretary of Health, Education, and Welfare, announced today that Thomas S. McFee, Deputy Assistant Secretary for Management Planning and Technology, will assume responsibility for the office mandated by the Family Educational Rights and Privacy Act of 1974.

This office will serve as the focal point for investigating, processing, and reviewing violations of the Act. It also will handle inquiries from individuals seeking information related to the protection of the rights and privacy of parents and students.

The office will be ready to function on November 19, 1974, the effective date of the law. Information requests should be addressed to Mr. McFee, c/o Room 5660, HEW North, 330 Independence Avenue, S.W., Washington, DC 20201.

The Secretary also reiterated the Department's firm support for the Family Educational Rights and Privacy Act. He stressed the President's endorsement of this approach to ensure the rights of individual students and parents and noted that it is consistent with the continuing efforts of the Domestic Council Committee on the Right of Privacy on which he serves.

The Secretary said the Department will publish its notice of proposed rule making to protect the rights and privacy of students and their families in connection with Department-assisted surveys and data gathering activities on the date agreed upon with Congress.

He also directed immediate development of regulations on those other sections of the law relating to access to official school records, hearings to challenge their content, and the release of personally identifiable data without student or parental consent. This second set of regulations will be published as a notice of proposed rule making as soon as possible, and in any event, no later than the end of this year. It is hoped that such regulations will provide members of the education community with the guidance necessary for them to establish their own procedures to ensure compliance with the law.

In addition, the Secretary directed the Department to work closely with Senator James L. Buckley (author of this Act), members of the Senate and House education committees, and representatives of public interest groups to develop any needed clarifying amendments. If the legislation is modified, the Department would, of course revise, its regulation.

CUMULATIVE RECORDS: ASSAULT ON PRIVACY

(By Diane Divoky)

It all started innocently enough back in the 1820's, when schools in New England began keeping registers of enrollment and attendance. In the 150-odd years since, the student records has grown to grotesque proportions. Like Frankenstein's monster, it now has the potential to destroy those it was created to protect.

Educators have constructed this monster in the name of efficiency and progress, adding a piece here and there, tinkering with new components, assuming all the while they were creating a manageable servant for school personnel. But what they failed to foresee was the swift development of modern communications technology and the widening employment of that technology by a social system increasingly bent on snooping.

The growth of the record into an all-inclusive dossier came in response to the increasing centralization and bureaucratization of schools. Another contributing factor was the emergence of education's ambitious goal of dealing with the "whole child." Out of that context grew such specific actions as the NEA's 1925 recommendation that health, guidance and psychological records be maintained for each pupil; and the American Council on Education's 1941 development of record forms that gave more attention to behavior descriptions and evaluation and less to hard data such as subjects and grades. By 1964, the U.S. Office of Education was listing eight major classifications of information to be collected and placed in the student record.

More recently, the Ohio Department of Education took a hard look at state laws requiring the keeping of such records and sounded a note of warning: "When construed with other statutes which give school authorities wide discretionary power . . . , it [is] obvious that schools may collect any kind of information they desire concerning pupils." Power of that magnitude, admonished guidelines for Ohio administrators, must be handled with great care and discretion.

The ultimate mushrooming of records may have been reached in the massive New York City school system -- largest in the nation. There, the records required or recommended for each child involve, if nothing else, a staggering amount of book work. A typical, rainbow-hued student dossier in New York carries:

A buff-colored, cumulative, four-page record card that notes personal and social behavior, along with scholastic achievement, and is kept on file for 50 years.

A blue or green test-data card on which all standardized test results and grade equivalents are kept, also for 50 years;

A white, four-page chronological reading record;

A pupil's office card;

An emergency home-contact card;

A salmon-colored health record -- one side for teachers, the other for the school nurse or doctor;

A dental-check card;

An audiometer screening-test report;

An articulation card, including teachers' recommendations for tracking in junior high school;

A teacher's anecdotal file on student behavior;

An office guidance record, comprised of counselors' evaluations of aptitude, behavior, and personality characteristics.

A Bureau of Child Guidance file that is regarded, though not always treated, as confidential, and includes reports to and from psychologists, psychiatrists, social workers, various public and private agencies, the courts and the police;

And all disciplinary referral cards.

In New York and elsewhere, as the records began, to contain more detailed and varied information, they took on lives of their own; they became, somehow, more trustworthy and permanent than the quixotic people they represented. Read the cumulative folder of a student -- 131 IQ, strong language skills, musical talent, loss of vision in one eye, per-missive home -- and then meet the child. If he doesn't come on bright, articulate, humming a little and self-assured in spite of a squint, something, one feels, must be wrong. And it's not likely the record will be blamed.

As the process of information collection in the schools snowballed -- a few more forms for the guidance department, a few more facts for state agencies, another set of teacher comments for a new tracking plan -- almost no one stopped to weigh the implications of recordings; so much hard and soft data about children and their families. There was little thought given to development of clean policies and practices by which student and parental rights of privacy might be balanced against the needs of the school and other social agencies to know, or to guarantee, that material contained in records was accurate and pertinent.

Thus, by 1970, almost any government agent could walk into a school, flash a badge and send a clerk scurrying to produce a file containing the psychiatric and medical records of a former student. It was unlikely that the student would even know about the intrusion into his private life. A mother could be coolly in-formed that she had *no right* to see the records that resulted in her being transferred to a class for the mentally retarded. A father attending a routine parent-teacher conference about his out-going son could discover in the boy's anecdotal record comments that he was "strangely introspective" in the third grade, "unnaturally interested in girls" in the fifth, and had developed "peculiar political ideas" by the time he was 12 -- judgments that the father could neither retroactively challenge nor explain.

Case histories such as those helped motivate sociologists David A. Goslin and Nancy Bordier of the Russell Sage Foundation to under-take a survey of the record-keeping practices of 54 representative school districts. They found that the systems maintained as part of their permanent files widely varied infor-mation on students. Almost all kept informal teacher-made anecdotal records, special health data, notes on interviews with parents and students, correspondence from home, records of referrals, delinquency reports and other "high security" data. Nearly three-fourths of them also kept personality ratings, samples of student work, diaries, and auto-biographies. One-third recorded the race and religion of students, almost half recorded students by nationality, and half kept photographs on the record forms. The research team also discovered from the school psychologist that a front office clerk might be responsible for feeding information into the permanent file. (One interesting sidelight: The records were consistently little used by teachers and school staff, a finding that flew in the face of the official rationale that the dossiers were needed to guide teachers in their relations with individual students.)

Goslin and Bordier also found that CIA and FBI agents had access to the entire student files in more than half the school systems, as did juvenile courts and health department officials. Local police had access to complete files in almost one-third of the systems. But parents -- those citizens with primary legal and moral responsibilities for the child -- had access to the entire files in fewer than 10 percent of the systems. Some superintendents reported that parents were denied access to their children's records even when they possessed the legal right to inspect them. "What is particularly significant," the researchers noted, "is the impression that school officials have strong reservations about giving parents very much information (other than routine grade reports and sometimes achievement test scores) about the content of evaluations that are continually being made of their children."

As a follow-up to the Goslin-Bordier study, the Russell Sage Foundation convened in 1969 a group of prominent educators, lawyers and social scientists to consider the ethical and legal aspects of school record keeping and to develop guide-lines for the collection, maintenance, and dissemination of these records. The conference report began: "There are clear indications. . . that current practices of schools and school personnel relating to the collection, maintenance, use and dissemination of information about pupils threaten a desirable balance between the individual's right to privacy and the school's stated need to know." It pointed to these abuses:

"Information about both pupils and their parents is often collected by schools without the informed consent of either children or their parents. Where consent is obtained for the collection of information for one purpose, the same information is often used subsequently for other purposes.

"Pupils and parents typically have little or, at best, incomplete knowledge of what information about them is contained in school records and what use is made of this information by the school.

"Parental and pupil access to school records typically is limited by schools to the pupil's attendance and achievement record (including standardized achievement test scores).

"The secrecy with which school records usually are maintained makes difficult any systematic assessments of the accuracy of information contained therein. Formal procedures permitting parental or pupil challenges of allegedly erroneous infor-mation do not exist . An unverified allegation of misconduct may therefore . . . become part of a pupil's permanent record.

"Procedures governing the periodic destruction of outdated or no longer useful information do not exist in most systems.

"Within many school systems, few provisions are made to protect school records from examination by unauthorized school personnel.

"Access to pupil records by non-school personnel and representatives of outside agencies is, for the most part, handled on an ad hoc basis. Formal policies governing access by law enforcement officials, the courts, potential employers, colleges, researchers, and others do not exist in most school systems.

"Sensitive and intimate information collected in the course of teacher-pupil or counselor-pupil contacts is not protected from subpoena by formal authority in most states."

The report concluded that "these deficiencies in record keeping policies . . . constitute a serious threat to individual privacy in the United States." It suggested guidelines for record keeping based on these principles: (1) No information should be collected about students without the informed consent of parents and, in some cases, the child. (2) Information should be classified so that only the basic minimum of data appears on the permanent record card, while the rest is periodically reviewed and, if appropriate, destroyed. (3) Schools should establish procedures to verify the accuracy of all data maintained in their pupil records. (4) Parents should have full access to their child's records, including the right to challenge the accuracy of the information found therein. (5) No agency or persons other than school personnel who deal directly with the child concerned should have access to pupil data without parental or pupil permission (except in the case of subpoena).

In 1972, the Sage Foundation tackled the subject once more and found that, in spite of the distribution of 100,000 copies of its guidelines, "the vast majority of schools in this country still do not have records policies which adequately protect the privacy of students and their parents."

The researchers also noted that a good policy may not begin to solve record problems. In one school system visited by a researcher, a written policy was drawn up by a committee, composed entirely of counselors. As a result, "the social worker thought it did not apply to her records, the mechanics teacher who had considerable informal contact with local employers thought that it only applied to formal requests for information handled by the registrar, and one of the principals regarded it as of the utmost importance to stay on good terms with local employers by telling them in detail of all the behavior problems potential employees had experienced while in school."

The Sage reports and guidelines helped fuel a growing national alarm about threats to privacy posed by our technological and bureaucratic society, and several educational groups subsequently took public positions insisting on the confidentiality of records. In 1971, NEA, which 46 years before had urged more comprehensive record keeping, approved the code of Student Rights and Responsibilities, which asserts that the "interest of the student must supersede all other purposes to which records might be put," and urges strict policies to protect the rights to privacy of students and parents. It suggested that junior high students have joint control with their parents over their own records, and high school students, total control.

Recently, a few local school boards, notably those in Des Moines, Iowa and Jefferson City, Missouri, have adopted regulations to safe-guard records. Des Moines allows parents and students to see the re-cords, asks written consent of them before any information is released to anyone else and gives them the power to determine which records may never be released to anyone.

On the state level, Oregon has given parents the right to- inspect the total record. Delaware grants students 14 years or older control over the release of information from their own records, and New Mexico guarantees any public school student the right to inspect his own record. Both New Mexico and Oregon have moved to keep records confidential from outsiders. Oregon law prohibits the release of records to anyone other than the parents and child. The New Mexico board of education policy statement says that "government investigative agencies as such have no inherent legal right to have access to student files and records," and the board bars them from access without the student's permission or a court order. New Hampshire prohibits schools from keeping records that "reflect the political activities or beliefs of students."

Some educators and parents, discouraged with waiting for legislators, or school administrators to act, have sought to take the reins in their own hands. In San Francisco, a group of black teachers and counselors are working for the elimination of all records except for a small card of hard data. They argue that the image of a folder as some capacious pocket into which all sorts of alleged wrongdoings and bad marks can be dropped has a bad psychological effect on students, that the folders consistently contain indefensible and gratuitous negative comments but little about the student's real educational ability, and that these biased comments are used authoritatively by the schools, particularly by guidance counselors, who see a folder as a kind of bible. "Black students' folders tend to be at least half an inch thicker than those of white children," one of the committee members said "which tells you something about the child even before you open the folder."

The manner in which the thick folders of a group of junior high school students in Washington, DC, were handled is now the basis of *Doe v. MacMillan*, a case before the U.S. Supreme Court. The suit was triggered when the House Committee for the District of Columbia, in preparation for its annual hearings on the D.C. schools, sent investigators out to gather up the cumulative records of students. Copies of actual test papers, disciplinary reports and evaluations -- defamatory if not libelous materials -- were reproduced with the students' names still on them. The report was then published by the committee's chairman, entered in the Congressional Record and circulated about the country. Parents sued the individual congressman, as well as the school board, principal, and teachers. Sovereign immunity protections in the District of Columbia complicated the case, but the U.S. Supreme Court recently ruled that the congressmen had no special immunity "from local laws protecting the good name or the reputation of the ordinary citizen," and remanded the case to the Court of Appeals for further action. Not coincidentally, the D.C. board of education established regulations for protection of records just as the complaint was filed.

But even the best-intentioned policies don't guarantee ethical practices. A fair record policy in a suburban school district near Cleveland fell into disrepute when it was learned that students were regularly given the job of transporting records from one building to another and were just as regularly snooping on each other.

A California law passed in 1959 assures parents of the right to inspect their children's cumulative records, but local school officials frequently refuse access or fail to inform them of the privilege.

California's state education code also forbids school employees from giving out personal information about pupils to anyone except specified officials. That didn't stop one district administration, acting in advance of a school board hearing into the suspension of a student, from publicly announcing that the boy had been guilty of "serious violation of manners, morals and discipline." Three years later, the courts found that the public statement was based on nothing more than allegations of the school superintendent, and the student was awarded damages.

So, while scattered improvements in the national picture have indeed occurred, school records continue to provide an easy route for invasion of privacy. Perhaps the worst abuses of school record keeping in America occur, despite well-established guidelines to the contrary, in the country's biggest and reputedly most liberal city, New York.

During the months that the author served on the New York City board of education's committee to revise student records (as chairman of the subcommittee on safeguarding and dissemination), these incidents occurred:

A secretary at a private tutoring agency calls a public junior high school to inquire about a child's reading level. The principal opens the child's record and gratuitously informs the unseen caller that the child has a history of bed wetting, his mother is an alcoholic, and a different man sleeps at the home every night. When the disclosures are reported to the board of education, the principal denies the incident and his immediate superiors back him up.

A teacher of a child entering a new school gets this summary of the student's past academic year: "a real sickie -- absent, truant, stubborn, and very dull. Is verbal only about outside, irrelevant facts. Can barely read (which was huge accomplishment to get this far). Have fun.

A black father who works for the school system has a friendly teacher show him his bright daughter's "confidential" record. In it is a five-page critique of how his own community activities as a "black militant" are causing his daughter to be "too challenging" in class.

Yet New York State has the clearest regulations in the nation concerning student records, thanks to a series of administrative and legal decisions dating back to 1960. In that year, the Levittown board of education directed that parents be permitted access to all the school records of their children, including evaluations, guidance notes and medical, psychiatric and psychological reports. A dissenting board member appealed the decision to the New York State commissioner of education. The result was a landmark ruling, *Matter of Thibadeau*, which specified that, as a matter of law, parents have access to all their children's school records.

Yet, in the following year, the administration in a neighboring New York school district refused to allow either the father or the private physician treating the former's son to see the boy's records. The father went to court, and the decision, *Van Allen v. McCleary*, stated: It needs no further citation of authority to recognize the obvious 'interest' which a parent has in the school records of his child." The court added that the parent's right to see the records stems from "his relationship with the school authorities as a parent who under compulsory education has delegated to them the educational authority over his child." Since both the *Thibadeau* and *Van Allen* rulings affected all New York State school systems, they became the basis for the detailed *Manual on Pupil Records* distributed to all school personnel.

Handed that clear mandate to allow parents access to records, how did the New York City school system respond? In May 1962, the board of education sent a special circular to all schools stating that most data in records -- guidance notes, medical and psychological, social agency reports -- "are not part of the official school record and are, therefore, not to be made available for parents to inspect." The system restated that policy in 1964 and 1969, insisting it was "in conformity with State regulations."

In 1970, the New York City system, disturbed by the publicity surrounding the Russell Sage guidelines and fearful of lawsuits, took a small step forward for privacy. It appointed an impressive committee of school department and civic representatives to review and help shape its policies.

An incident during the policy revision process said a good deal about the power of bureaucrats to ignore or override policy. The committee, hearing that school employees were regularly providing sensitive information about students to outside agencies, urged the chancellor to order an end to the practice until a new policy was settled on. He did so. Fifteen days later, under pressure from school administrators, he rescinded the order. During that short period of time, 28 separate and distinct categories of outsiders had called the board of education to complain that their usual sources of information about students had been cut off. They included FBI agents, military intelligence officers, welfare workers, policemen, probation officers, Selective Service board representatives, district attorneys, health department workers and civil service commission officers.

Inside education's own house, the most vocal opponents to giving parents access to student records are those who write and maintain the most sensitive and inferential records: the guidance counselors. In 1961, the American Personnel and Guidance Association issued a policy statement on the use of records that asserted that counselors have the right to decide which records parents should see and how those records should be interpreted to parents. The counselors generally argue this way: What if a child tells of a home situation that may be defamatory or even illegal, but is important to record for the future counseling of the student? What if parents misinterpret the professional notations of counselors? What if the child needs someone outside his home to confide in?

The other side of the argument is that if information is so delicate or painful that parents shouldn't see it, it probably shouldn't be in a school folder at all. Counselors answer that student evaluations will be badly watered down if those writing them know parents will see them -- a statement that raises provocative questions about the school's views of the parents of their students, and its honesty in dealing with them.

Dealing with this issue, the *Buffalo Law Review* pointed out in 1970 that when a school evaluates a child, it is acting *in loco parentis*, because evaluation is a parental function that has been extended to the school. But, "once the school authority insists on keeping its evaluation of a child secret, then it intrudes into the domain of parental prerogative and oversteps its legitimate *in loco parentis* authority, for it is obvious that a parent can control publication of his evaluation of his own child and can keep secret from the world at large such evaluation."

There are, of course, circumstances in which the best interests of a child and inspection of his records by his parents may conflict. However, definition of those circumstances is made difficult by an unresolved ambivalence about whom counselors and school psychologists serve. If the counselor's client is the student, then the counselor should guard the pupil's records and interests zealously against all other parties, including other school employees. But if his client is the school system that pays him, and his job is trying to help adjust that student to the existing educational environment, then the counselor or psychologist might feel free to share personal information about the student with other educators and government agencies but not with parents who become a sort of third party. Counselors who are used by school systems primarily to discipline truants and misbehavers unavoidably feel that the institution, not the child, is the client. Administrators all too often evaluate counselors not on the well-being of the child, but on the thickness and currency of his record folder.

Perhaps the biggest problem faced by all concerned is the fact that we live today in a world of technologically recorded, maintained and communicated information. In 1968, the Phoenix, Arizona Union High School System introduced a cumulative record system that enabled any staff member to pick up any phone in his school, push a button, dial a code number, dictate comments about a student into a remote recorder and play back comments made by other staff members. The comments, recorded on magnetic tape or a plastic disc in a central records room, are often transcribed by a typist onto pressure-sensitive labels that are entered in the student's permanent file. A clerk sorts the transcriptions, and they are delivered to the appropriate guidance counselor for inclusion on the cumulative record. Color coding identifies the kind of information, contained on each gummed label -- health attendance, discipline or financial. Efficient, unquestionably. But what happens if a teacher calls in a comment at the end of a bad day and two weeks later regrets it, but the information has already made its way to the storage system? What if the typist misunderstands the dictation? What if the staffer dials a wrong number? The potential for abuse is staggering.

The state of Florida already has a centralized record-keeping computer system, which employs an IBM 1230 Optical Scanner to enter data for all pupils from the ninth grade on up into a computer. These items appear: Social Security number, grade, school, address, type of curriculum, date and place of birth, citizenship, health and physical disabilities, sex, race, religion, marital status, family background, languages spoken at home, academic record, test record, honors-work record and extra-curricular activities. Iowa and Hawaii are installing similar systems.

Just last April, the New York State Education Department asked 85 school districts to supply the names and addresses of all students who have received psychological or social work services; have a history of truancy, delinquency, drug abuse or alcoholism, or a "potentially disabling emotional, physical or mental handicap"; or have attended classes for unwed mothers, for the "socially maladjusted," or in drug-abuse prevention. In no cases were parents asked for permission to release the information.

Many systems complied. In one that didn't, Commack, New York, the director of pupil personnel services said his district would not send the names along "until I receive a statement . . . that they will not be put in a computer . . ." The Nassau (County) Psychological Association took a strong stand against the information release, telling all schools: "Releasing this information without securing authorization from the parent or guardian is inimical to the professional behavior of the psychologist."

Even the federal government, not the greatest defender of private rights in recent times, has begun to show some concern about the possible adverse effects of computerizing personal records. An HEW task force on data banks, concerned at first primarily with the recent push to require Social Security numbers of all children entering schools, has broadened its inquiry to include a wide range of other record problems. Another HEW group has been studying how records contribute to the systematic classifying and inappropriate labeling of school children.

What is often described as California's "pioneering" work in social control suggests ways in which schools inadvertently may feed information about their students into Big Brother computers. With funds from Title I of the Omnibus Crime Control and Safe Streets Act of 1968, the California Council on Criminal Justice has set for on this mission of making "Californians safe from crime." CCCJ funds a statewide program called "Correctionetics." It computerizes and centralizes all juvenile records, including information on psychiatric treatment. Under state law, children down to the age of six years who have been identified as being "in danger of becoming delinquent" can become a California Youth Authority statistic with a record.

As if that weren't enough, CCCJ is looking for other potential problems that might be computerized. One program, funded for two years, instructed kindergarten teachers in sophisticated methods of identifying "target students" -- those five-year-olds whose social and academic profiles were similar to those of adolescents who ended up in juvenile courts.

Suddenly, an unwary kindergarten teacher has become in effect a government intelligence agent.

NSA PRESIDENT STRONGLY SUPPORTS BUCKLEY AMENDMENT

National Student Association President Kathy Kelly spoke out strongly today in endorsement of the Family Educational Rights and Privacy Act of 1974 sponsored by Sen. James Buckley (Conservative, New York). President Kelly, former student body president at the University of Minnesota at Minneapolis, took exception to certain technical problems with the language of the bill which should be clarified with additional amendments to be introduced when Congress reconvenes.

But she noted that the bill provides a long overdue mechanism for correcting misinformation and errors in students' records which may be vital to their careers and President Kelly hopes that efforts on the part of some educational organizations to delay implementation of the bill will be defeated in light of the pressing need for the legislation.

President Kelly said that the National Student Association, the oldest and largest organization of student governments in the country, has long been an advocate of the legal rights of students, and the Association feels strongly that this bill will curb the arbitrary power that has so often been misused by school administrators and agencies allowed easy access to students' records. Such access, denied parents or the students themselves, has negatively affected students' careers both in school and long after their tenure in the academic community.

The bill would provide parents or students access to records and an opportunity to challenge inaccurate or misleading information therein. Permission of the parents or students must be obtained before records can be released to persons or agencies outside of the school. Also, parents and students must be notified of their rights to inspect records.

The Association hails this bill as a long overdue injustice redressed, and commends Senator Buckley for drafting it.

[FROM THE HARVARD LAW RECORD, NOV. 8, 1974]

BACKBENCHER: HARVARD FAVORS SECRECY, AGAINST CANDOR

(By Ira Nerken)

Faced with the release of the Pentagon Papers, Dean Rusk threatened an end to the placement of important information (vital to an informed public) on paper. Faced with demands for the White House tapes, Richard Nixon threatened an end to "candor and frankness" (constituting an abuse of trust) in the oval office. Faced with Senator Buckley's bill giving students access to their own educational records, Harvard has threatened both an end to the placement of information vital to students in their records, and an end to frankness and candor in their files.

With the emergence of the issue of student access to files that most vitally affect them, the arrogance of power in academia -- at Harvard particularly, but also at other institutions of higher learning -- has been set out in bold relief.

Yet, to listen to the University's Counsel, Daniel Steiner, one would think the issue is neither Harvard's resentment of any constraints on its autocratic exercise of power, nor even real problems with the substance of the Buckley amendment. Buckle's bill is "terribly drafted," and "extremely ambiguous," claims Steiner, and the "heart of the University's objection," is "the lack of opportunity to be heard." For this, Steiner merits a special citation for disingenuousness. For, while these issues may have some validity, they have little to do with Harvard's real objective, which is to kill the Buckley bill.

Last summer, State Representative Lola Pines introduced a bill in the Massachusetts legislature similar in substance to the Buckley amendment. Pines had drafted her bill well. It was not ambiguous. Steiner was given not only the opportunity to be heard, but to suggest alternative proposals. In that situation, he argued that "unless the legislature knows of specific violations, legislation shouldn't be enacted." As to drafting proposals, he doubted anything could be drafted that would serve her [Pines'] purposes and ours."

"Harvard administrators," according to the *Crimson*, "have said repeatedly since the [Buckley amendment] passed Congress that it will hurt students because they will no longer be able to get straight-forward and honest letters of recommendation. (Thus, we learn the new Harvard motto: "Veritas -- but not to your face.") This is not only a sordid, but also a hoary argument, and one well-answered by President Prentice of Wheaton College, responding to a similar argument: "How can an evaluation be considered 'honest and candid' if it is to be kept from the person evaluated? I agree that my criticism of my student should be a matter between him and me and people who have a responsible right to my views. They should not be available to the general public, but they must be available to the candidate himself if I am to be considered 'honest and candid.'"

Admittedly, the protection Harvard heretofore afforded the hatchet job is gone -- unless the hatcheteer wants to phone the University. But it took a Harvard senior tutor to point out what Harvard administrators and faculty chose to ignore: "those professors who occasionally say they'll write and then don't write a glowing letter will now say nothing, as they should have done all along."

As to the other hobgoblins Harvard has manufactured, *The Buckley Amendment would allow students to violate the confidentiality of their parents' financial statements.* If parents are concerned about this, and can't get a promise from their sons/ daughters not to peek, that is their problem -- not Harvard's. *Students could see psychiatric reports.* Why in blazes are psychiatric reports lying around in files anyway? And if they must be there, why shouldn't the students look? *Harvard can no longer protect students from being forced to supply potential employers with materials from their files.* Maybe we need a law to protect Harvard students from overbearing employers.

Professor Alan Heimert, of the Harvard English Department, announced the Buckley bill as "representing the traducing of an entire profession. This law says that academics don't have any ethics, that academics don't even have any common sense, and that any negative recommendation is written in bronze." Perhaps Heimert should compare his words to those of the policemen who claim procedural restraints on their powers to search, etc. are a "traducement of the entire profession." Perhaps he should wonder why courts are allowing defendants to see their presentence reports, without worrying that this implies the judicial system has no ethics or common sense.

Finally, a word of advice to Harvard. Dean Rosovsky (FAS) has talked of "having no choice but to honor the law." But the Secretary of the FAS Council said that while the faculty's "initial posture" would be "full compliance" with the law, "non-compliance isn't out, but it isn't in." James Q. Wilson said, "no one is talking about noncompliance at this stage." Such talk may get Gerald Ford to issue a statement deploring non-compliance, but saying Congress was wrong. But it will be hard to kick Southie around anymore.

QUESTIONS ABOUT AND OBJECTIONS TO THE BUCKLEY AMENDMENT -- THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974 (SEC. 513 OF P.L. 93-380) -- AND RESPONSES

Numerous higher education groups are voicing complaints about and objections to the Buckley amendment. Our office receives calls and letters about it every day. It is natural that they should complain; they are being required to change long established practices and (bad) habits, and change is often painful, or, at least, uncomfortable. Most of their objections are not substantive, however, or can be resolved by reasonable regulations. But there is one largely reasonable concern, which will be addressed later.

While there is an effort underway to lobby for delay in the implementation of the amendment, most schools and agencies seem to be able and are in fact preparing to comply with implementation on November 20, 1974. We have received calls from schools, school districts, school boards, colleges, and universities, from all across the country; nearly all the callers have said that their schools are developing a policy and procedures for compliance, but that they have a question or two as to what a particular aspect of the bill means or includes, or whether such and such procedure on their part would be appropriate. In fact, we have even received regulations prepared by local school districts, which are not in force, to implement the law.

As further evidence that schools across the country are willing and able to comply, let me offer a quotation from the "Education Daily" of September 27, 1974:

"In advisories to their members to explain what will be expected of them under the new privacy requirements of the Education Amendments of 1974 (P.L. 93-380 --Ed. Aug. 16), both the National Association of Elementary School Principals and the American Association of School Administrators are suggesting that schools review their policies on record-keeping and develop standards as to what should be in cumulative student folders in the first place.

"It would be a good idea," says Dr. Paul Salmon, Executive Director of AASA, for schools to remove from the folders and destroy such things as unsubstantiated teacher opinions or language which tends to "categorize" students. While many schools already have rules requiring student records to contain only responsible and documented information, Salmon points out, others have tended to "drop everything that came along" into the cumulative folder. For such schools, Salmon and NAESP's William Pharis say, the best advice is to get their records into order before the law goes into effect November 20."

It is also worth noting that more than 20 states already have state laws or regulations on the books essentially similar to the Buckley amendment. In Virginia, for example, even grade schoolers are now permitted access to their school records!

All this is not to suggest that there are no problems and uncertainties involved in the implementation of the Buckley amendment. But it must be realized that such problems and questions arise before, during, and after the implementation of nearly every law. That is one of the reasons we have courts, where considerations of the intent of legislation, the test of reasonableness and of equity usually combine to produce proper and appropriate applications of the law. We also have administrative procedures, particularly in this case, for clarifying and adjudicating issues which may arise.

However, most, if not all, of the questions that are being raised about the amendment, can be resolved without need of recourse to the courts. The law is still new and it has not been fully explicated. Regulations to be issued by HEW should clear up many of these questions. The meeting held in early October between members of the staff of the Congressional Education committees and representatives of HEW to discuss regulations regarding the implementation of the Buckley amendment helped clear up some of the apparent problems. The meeting that OE recently had with interested educational parties highlighted various problems. Now the HEW Task Forces are proceeding to draft appropriate regulations. Secretary Weinberger has announced that regulations will be published before the end of the year. With reasonableness and cooperation on all sides, much can be acceptably resolved without need of further legislation.

QUESTIONS AND OBJECTIONS

1a. Prior Confidentiality -- what about the amendment's applicability to already existing letters, statements, and evaluations which were written with the understanding that they would remain confidential -- i.e., not for the eyes of the student in question? Would not access to these items involve a violation of the rights of privacy of their authors?

1b. Confidential recommendations on the part of teachers, counselors, etc., are important aids to evaluating students, especially for college and graduate school admissions offices. If these statements were to be available to the students in question, their authors would be very unlikely to be candid and frank in their assessments of a student's strengths, and especially his weaknesses. This would make the selection process more difficult and tend to penalize the talented student who is not a good test-taker.

1. Response -- These objections are the most significant and substantive of those that have been raised. While it is not the intent of the Buckley amendment to override prior, acknowledged confidentiality, nor to preclude any confidential assessments and recommendations in the future, the language of the amendment seems to eliminate such confidentiality.

In the great majority of cases, these confidential statements are at the request of the student himself with the understanding he would not have access to them, although many teachers do provide copies of such statements to their students. Such an understanding on the part of the student and the teacher, while often impled, is nonetheless an agreement which in effect gives the confidentiality of these statements special standing.

On the other hand, there are some evaluations and comments of which the student is totally unaware, sometimes written by individuals with an inadequate knowledge of the student or with a personal bias against him. Such evaluations sometimes find their way into a student's official file, where they may do inestimable damage to his future. In other situations official Committees prepare and send evaluations of a student to other schools to which the student is applying. The student generally had no idea of the content of the evaluations and no opportunity to submit his own statement. Cases sometimes arise, therefore, where a student is "judged" and found "guilty" or wanting by a school or an employer without any opportunity to know who his "accusers" are or what has been said against him.

One fact that should be realized if we are to keep these matters in current perspective, is that a number of parents and students have already fought successfully in court to have school records including confidential evaluations relating to college admissions opened to them for good cause. The rippling effect of these court decisions may eventually make much of this discussion academic.

One way to deal with the confidentiality question might be found by having the teachers and schools seek a written waiver of access from students in connection with certain recommendations and evaluations (as is already being done in some places). On the other hand, students should seek a guarantee of access to such recommendations and evaluations whenever they can (this is also already being done in some places).

Because the Buckley amendment is silent on this subject, the seemingly all inclusive nature of its language would seem to override privileged confidentiality. Realizing that the rights of teachers and counselors and the evaluation requirements of colleges need to be considered as well, we would hope that equitable provisions for this situation could be worked out by regulations. Failing that, instead of seeking to delay the implementation of the law, we would suggest that it be amended in the following general manner:

> Provided, however, that such personally signed statements or letters to which the student (or his parents) has previously waived in writing his right of access, or which are dated prior to and are generally acknowledged to have been written in confidence, shall not be available to the student or his parents, except upon permission of the author or the order of a court of competent jurisdiction.

Such an addition would perhaps deal adequately with the prior confidentiality question. It would also permit a waiver of access by the students, so that colleges and universities would be able to receive more "candid" evaluations, instead of the bland, useless ones which they fear the Buckley amendment could produce. (On this point, let me note that Dr. Joseph Ruth, Director of Admissions for George Washington University, has commented that recent court decisions providing students and parents with access to school application files have already produced increasingly bland and less useful letters of recommendation -- prior to and independent of the Buckley Amendment.)

Some colleges might contend giving the student the option to seek confidential or non-confidential recommendations will still render them useless. But surely this ought to be the right of the student and the teacher to decide. Let it also be remembered that the student is generally hoping to gain something by obtaining a recommendation. A bland, useless recommendation will not be helpful to him. It should generally be to his advantage to take the calculated risk or gamble -- his trade-off -- of a confidential recommendation which could prove helpful to his ends.

There is no reason, under this procedure, for a teacher to be unwilling to write a thoughtful, positive recommendation on a student whose average grades may mask a superior potential and imagination. And surely the average admissions officer can distinguish between a bland letter which says essentially nothing and an enthusiastic or detailed letter which has something of value to say. Even in terms of negative comments, are we wrong assuming that most teachers would have the moral courage of their convictions to say what they believe, even in the face of disclosure to the individual in question? Or is it that they have often been too loose with their comments, too generous with their personal prejudices and too sparing in their objectivity?

The comments sent to us by the Chairman of a department at a major university are perhaps instructive here:

"It may be that a recommendation 'is not likely to be candid if the writer knows it can be read by the subject,' but it certainly will not be an unfair one. Those of us who make recommendations which may affect the lives of others certainly should have the courage and decency to be willing to have our judgments questioned. If I am unwilling to allow a person to see what I say about him then it is probably true that I should not say the thing at all."

* * * * * *

2. How broad is the term "any and all official records, files, and data" to which students must be given access? Does it cover psychiatric files, counselors files, all records of every officer whether at home or in the office? Does it cover the notes of a dean or a professor after he has talked with a student?

2. Response. This is the second most important objection to the Buckley amendment, but I feel that most concerns here can be favorably resolved with careful clarification of the amendment language.

The key language of the amendment on this point is underlined in the following quote:

"Any and all official records, files, and data directly related to their children including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system."

The amendment is addressing official records or files or data which are intended for school use or to be available to parties outside the school or school system. The language is not intended to apply to the personal files of psychologists, counselors, or professors if these files are entirely private and not available to other individuals. Records "intended for school use" should generally include those established by an office or a division of the school for the use of that office or division. The definition of the words "official" and "intended for school use" are of major importance. It appears that the definitions and regulations being developed at OE will employ a judicious interpretation of these words, one which is not necessarily all-inclusive, and which will give consideration to the use to which the files are put. In general, it is to be hoped that the law shall be interpreted and implemented -- and obeyed -- with an attitude of reasonableness. The listing of specific items in the law which follows the quoted part above is intended to prevent the establishment of a separate "Unofficial" file by the school, as has happened in some areas where state or local laws provide for access by parents and/or students.

3. How will the law affect career placement files, "academic credentials" files, which contain confidential recommendations?

3. Response: Again, these files are set up solely at the request of the student, with his understanding that he will not have access to such confidential recommendations as are contained therein. If we can establish in the law that such an understanding, i.e., waiver of access, is a legitimate exception to the general requirement of the law, then there should be no problem here.

On the other hand, since these files will have a significant effect on a student's academic and/or job prospects, it seems not only reasonable, but also very important to the student's interests, that he have some idea of what is being distributed to prospective employers, etc. about his abilities and character. In such a situation should a student be required to rely solely on the judgement of a placement office as to what unknown (to him) comments and information are to be sent out about him? It seems only fair to at least give a student a listing of the items about him that are being distributed to prospective employers, etc.

4. Inventive teachers and officials will find ways to circumvent the law.

4. Response. Very likely in some areas. This is true of virtually every law. However, the major purposes of the law will be largely achieved: Parents and students will have access to their school records; inaccurate, misleading information will be able to be removed from records; the gen eral availability of confidential information on students to parties outside the schools will be strongly curtailed.

5. The law contains important ambiguities that should be cured by legislative action. There is little or no evidence of Congressional intent to provide guidance.

5. Response. There do exist some apparent ambiguities, but most of the law is quite explicit. The law has yet to be fully explained. This takes time for every law, and even a committee Report is usually not adequate. There is great evidence of Congressional intent to provide guidance, to wit: the meeting between the Congressional Education committees and HEW on the regulations and implementation of the Buckley amendment; the required submission of proposed regulations pursuant to P.L. 93-380 to the Congressional Education Committees for their review and approval.

6. Will the amendment permit students to have access to their parents' Confidential Statements, etc.?

6. Response. It should not. The language specifies "records, files and data *directly related* to their children" (the student). While the Buckley office attempted, but failed, only because of confusion and inadequate time, to get the Conference on HR 69 to specifically exempt Parents Confidential Statements, such statements and related information can be reasonably interpreted as not being *directly related* to the student, in the sense that the data is on other individuals. It should, therefore, remain confidential.

7. Under the law, a college will not be able to give any information about a student to his parents without his consent.

7. Response. False. This is surely an overly narrow reading of the law. Nothing in the law is intended to prevent a school official from informing a student's next of kin that he is on the verge of suicide, has had an accident, has been arrested, or even that he is doing very poorly in school and might benefit from some thoughtful communication or assistance from his parents.

8. The Act requires institutions to provide hearings for students to challenge any record they consider inaccurate or misleading. Does this mean that hearings must be held if a student thinks his essay deserved an A and it is "inaccurate and misleading" for his records to show a B? Or if a professor's evaluation, filed with the student's department, says that the student showed little creativity in his written work, must the institution offer a hearing on the issue of the student's creativity? In short, what is the scope of the right to a hearing?

8. Response. This is another red herring. The question of a grade is a matter to be taken up with the teacher involved, and perhaps the department chairman. The items at issue in nine out of ten cases will be erroneous information (as a grade incorrectly recorded), anecdotal comments or evaluations by teachers , or personal information on the student or parents which probably has no business being in such a file. There is no pressing need, nor is it always desirable for a law to fill in every jot and tittle of procedures and the like. There needs to be some legitimate leeway for administrative discretion and flexibility. Besides, no law could ever enumerate and prejudge every possible situation that might arise under it. Regulations are expected to outline basic minimums in regard to hearing procedures.

9. Despite its evident purpose of protecting students' privacy, the Act is likely to cause invasions of that privacy. Credit bureaus, prospective employers, governmental agencies conducting security clearances and other organizations can now require students to obtain all their records (psychiatric, financial, disciplinary, evaluations, etc.) and turn them over. Prior to the enactment of the Act, institutions could protect students by refusing to turn over such records even if a student had given consent.

9. Response. This is something of an insult to the intelligence, independence, and backbone of today's student. Besides, who can really assert that a college student is better off at the mercy of any given school's policy on records dissemination, rather than his own judgement and decision? Actually, this is a somewhat superfluous because the law only requires that a parent or student have "the right to inspect and review" the records, not have a copy of all of them. The only records that he must be able to obtain a copy of are those which the school intends to give to an outside party!

10. Response. It is true that there were no hearings on this law. However, more than twenty states have enacted similar legislation, and the law was closely patterned on the carefully considered recommendations of respected experts and experienced professionals in such fields as law, education, medicine, counseling, school administration, and various academic disciplines (in particular see the *Guidelines* of the Russell Sage Foundation).

Legislation in the form of amendments frequently becomes law, and reported bills frequently have had no or inadequate hearings. In this case, the proposal had been circulated to the Senate and several educational organizations more than two weeks before it was passed. There was also ample time during the Conference for interested parties to suggest changes. In any event, the Congress saw fit to enact this legislation into law.

11. Does the Act give any rights to a person who has graduated and is no longer enrolled as a student? Or does a person who has applied to a college but was not admitted have any right of access to the college's records?

11. Response. By an oversight, former students were not specifically dealt with in the amendment, although it can be argued that a certain reading of the language would include former students. A court might extend this right to them as an important civil right of privacy, which falls "within the penumbra of the Constitution."

The case of a person who applied but was not admitted to a college was not addressed by the amendment. However, again, a certain reading of the language would include application files. Thus, these questions remain to be resolved. It is worth noting here, though, that at least on court decision has upheld access to such files.

12. Should all college students be treated the same vis-a-vis the rights established by this law?

12. Response. While emotional maturity is something that many people never achieve, the rights of adult citizenships are by and large conferred upon Americans at age 18 (voting, etc.). The House-Senate conferees felt it fitting and proper to extend the rights established by the Buckley amendment to any student who is attending a post-secondary educational institution, and no compelling body of evidence or argument has yet been put forth to successfully contest that judgement.

13. While this law may be appropriate for elementary and secondary schools, colleges and universities are different and the law should not apply likewise to them.

13. Response. This argument is an extreme case of in loco parentis. How is it that the these basic rights, which will very likely be established throughout the Federal Government by the end of the 93rd Congress (see §3418), are all right for an 18-year old high school senior, but not for a 21-year old (or an 18-year old) college student?

14. Is a right of private action created to enforce the Act or is the HEW compliance mechanism created by the Act the only means of enforcement?

14. a right of private action was intended in the Buckley amendment by reference to another part of the Senate bill. However, the language of the referred-to Senate provision, and the explicit right of private action is no longer in the law at this time. However, it may be interesting to note that the national PTA and the League of Women Voters are consi-dering establishing monitoring activities to review and seek com-pliance with this law.

15. The applicability of Section 438(b) (4) (a) of the Act is governed by its reference to subsections (c) (1), (c) (2), and (c) (3). There are no such subsections in the Act.

15. This is simply a technical printing error caused by changes made in the amendment in the Senate which necessitated relettering the paragraphs. The reference should be subsections (b) (1), (b) (2), and (b) (3). By the same token , the last section of the law should be labeled (h), not (b).

16. The effort of locating and correcting all the applicable school records will be a severe problem for educational institutions, particularly those in higher education.

16. Response. As stated in the beginning of this memorandum, of course the change of policies and habits occasioned by this law will cause discomfort and some administrative problems. So do most new laws. But that is certainly not a serious or credible reason to postpone implementation of the law or to argue that institutions of higher education should be exempt from the law. In-

deed, the objection is in itself compelling evidence of the need for the Buckley amendment. Schools don't even know what files and information on their students are floating around where and being given to whom!

On some campuses there may be as many as fifteen to twenty separate files on a given student scattered around the campus. Some school officials have felt that the law would require them to gather all these files together and review them centrally. But this is not necessitated by the law. All that is basically required is that the student be informed, if he makes an inquiry or request, of the existence and the location of these files, and that he or she be given the opportunity to review the appropriate files within forty-five days of the request. Individual offices might be advised to begin a general review of their files to see whether there are things in them which cannot be inadequately justified, or which they are afraid to let the student see. The question of whether or not officials could or should destroy items in the file, or send them back to their source, after a student has sought access to his files has not yet been fully resolved, although the law seems to permit it. There is a further question here as to whether this would be in the best interests of not only the students, but also the institutions involved. The anticipated speedy passage of an amendment exempting confidential letters and statements written in the past will resolve this question.

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

SEC 438. (a) (1) No funds shall be made available under an applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of denying, or which effectively prevents, the parents of students attending any school of such agency, or attending such institution of higher education, community college, school, preschool, or other educational institution, the right to inspect and review any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumu-lative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns. Where such records or data include information on more than one student, the parents of any student shall be entitled to receive, or be informed of that part of such record or data as pertains to their child. Each recipient shall establish appropriate procedures for the granting of a request by parents for access to their child's school records within a reasonable period of time, but in no case more than forty-five days after the request has been made.

"(2) Parents shall have an opportunity for a hearing to challenge the content of their child's school records, to insure that the records are not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein.

"b (1) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of permitting the release of personally identifiable records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization, other than to the following --

"(a) other school officials, includ-ing teachers, within the educational institution or local educational agency who have legitimate educa-tional interests;

"(B) officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

"(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 409 of the Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

"(D) in connection with a student's application for, or receipt of, financial aid.

"(2) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b) (1) unless --

"(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

"(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

"(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which related to such programs; *Provided*, That, except when collection of personally identifiable data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data has been collected.

"(4) (a) With respect to subsections (c) (1) and (c) (2) and (c) (3), all persons, agencies, or organizations desiring access to the records of a student shall be required to sign a written form which shall be kept permanently with the file of the student, but only for inspection by the parents or student, indicating specifically the legitimate educational or other interest that each person, agency, or organization has in seeking this information. Such form shall be available to parents and to the school official responsible for record maintenance as a means of auditing the operation of the system.

"(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

"(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

"(d) For the purpose of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only required of and accorded to the student.

"(e) No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

"(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section, and to deal with violations of this section according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

"(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section, according to the procedures, contained in section 434 and 437 of this Act."

(b) (1) (i) The provisions of this section shall become effective ninety days after the date of enactment of section 438 of the General Education Provisions Act.

(2) (i) This section may be cited as the "Family Educational Rights and Privacy Act of 1974."

CONFERENCE REPORT EXPLANATION OF ACTION ON BUCKLEY AMENDMENT TO H.R. 69

Protection of the rights and privacy of parents and pupils. -- The House bill provides that the moral and legal rights of parents shall not be usurped. In addition, the House bill provides that no child shall participate in a research or experimentation program if his parents object. The Senate amendment denies funds to institutions which deny parents the right to inspect their children's files and gives parents the right to a hearing to contest their child's school records. The Senate amendment also denies funds to institutions with policies of releasing records, without parental consent, to other than educational officials. Release of records is allowed only upon written parental consent. The Secretary is directed to adopt regulations to protect students' rights of privacy and shall enforce them through an office and review board in the Department of Health, Education, and Welfare to investigate and adjudicate violations.

The conference substitute adopts the provisions of the Senate amendment, including in the list of persons who should have the right to inspect student records those students who attend postsecondary insti-tutions.

An exception under the conference substitute occurs in connection with a student's application for, or receipt of, financial aid. The conferees intend that this exception should allow the use of social security numbers in connection with a student's application for, or receipt of, financial aid.

The conference substitute adds that nothing in these provisions of the Senate amendment shall preclude official audits of federally supported education programs, but that data so collected shall not be personally identifiable. The conference substitute also provides that the consent and rights of the parents of a student transfer to the student at age 18 or whenever he is attending a postsecondary education institution. No action to terminate assistance for violation of these provisions of the Senate amendment shall be taken unless the Secretary finds failure to comply, and that compliance cannot be secured by voluntary means.

The conference substitute also adopts the provisions of the House bill relating to protection of parental and pupil rights, with amendments. The conference substitute provides that all instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by parents or guardians.

In approving this provision concerning the privacy of information about students, the conferees are very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them. At the same time, the amendment is not meant to deny the Federal government the information it needs to carry out the evaluations, as is clear from the sections of the amendment which give the Comptroller General and the Secretary of HEW access to otherwise private information about students. The need to protect students' rights must be balanced against legitimate Federal needs for information.

Under the amendments, an educational agency would have to administer a Federal test or project unless the anticipated invasion of privacy or potential harm was determined to be real and significant, as corroborated by a generally accepted body of opinion within the psychological and mental health profes-sions. In short, the amendment is intended to protect the legitimate rights of students to be free from unwarranted intrusions; it is not intended to provide a blanket and automatic justification for a school system's refusal to administer achievement tests and related instruments necessary to the evaluation of an applicable program.

FAMILY EDUCATION RIGHTS AND PRIVACY ACT OF 1974

Mr. MCINTYRE. *Mr. President, I have* been informed that on the recently passed Family Educational Rights and Privacy Act of 1974, the Buckley amendment which became part of that has raised certain questions. The intent of the amendment was to allow openness of school records.

The language was written in haste and has raised serious questions in the minds of school officials.

The distinguished chairman of the Educational Subcommittee, the Senator from Rhode Island, is in the Chamber, and it is my desire to clarify this language.

It would be helpful to me and to many concerned school officials, however, to have a few points clarified to make sure my understanding of the changes is correct.

First, I notice that the proposed amendment deals with the problem of documents received prior to January 1, 1975, with an understanding of confidentiality and that it is specified that the rights of confidentiality as otherwise protected by law are not infringed by the act. This is an important change to protect the rights of people who wrote a letter, or a report with an understanding of confidentiality before the act came into existence. It is also important that common law privileges, such as doctor-patient and lawyer-client relations, are not violated. I would assume that in the interests of fairness, the proposed amendment means that confidential letters of recommendation and other confidential written statements received prior to January 1, 1975 need not be disclosed, provided that they are used only for the purposes for which they were written, and that the proposed amendment protects common law and statutory privileges of confidentiality.

Second, the proposed amendments define "education records" in order to make clear what documents and other material parents and students will have access to. I realize that it is difficult to draft a definition that applies to thousands of elementary and secondary schools and institutions of higher education, and I would hope that regulations would carry out the underlying intent of the basic definition. I would understand that intent to be that, except *as provided in the definition*, parents and students should have access to everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student.

Third, as I understand the act, it is designed to protect the rights of privacy of students and their parents and to give them access to documents that are used by the institution in making institutional decisions concerning a student. The act is not designed to require the retention of records or to require that institutions continue to retain and use records that have been used in the past. In fact, it could be said that the act's purposes are achieved when fewer records are kept and used.

I would appreciate the Senator's telling whether my understandings on these three points are correct.

Mr. PELL. Mr. President, I have listened carefully to the points raised by the Senator from New Hampshire and find that, as I read the proposed amendments, the points he has raised are correct.

Mr. MCINTYRE. Mr. President, I am pleased that the able and distinguished Senators from Rhode Island and New York have met on this matter in order to make such changes as are necessary to insure that the intent of the legislation is fully understood.

WHITE HOUSE CONFERENCE ON LIBRARY AND INFORMATION SERVICES IN 1976

Mr. PELL. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on Senate Joint Resolution 40.

The PRESIDING OFFICER (Mr. WILLIAMS) laid before the Senate the amendments of the House of Representatives to the joint resolution (S.J. Res. 40) to authorize and request the President to call a White House Conference on Library and Information Services in 1976 as follows:

" Strike out all after the resolving clause, and insert: That (a) the President of the United States is authorized to call a White House Conference on Library and Information Services in 1977.

(b) (1) The purpose of the White House Conference on Library and Information Services (hereinafter referred to as the "Conference") shall be to develop recommendations for the further improvement of the Nation's libraries and information centers and their use by the public, in accordance with the policies set forth in the preamble to this joint resolution.

(2) The conference shall be composed of, and bring together --

(A) representatives of local, statewide, regional, and national institutions, agencies, organizations, and associations which provide library and information services to the public;

(B) representatives of educational institutions, agencies, organizations and associations (including professional and scholarly associations for the advancement of education and research);

(C) persons with special knowledge of, and special competence in, technology as it may be used for the improvement of library and information services; and

(D) representatives of Federal, State and local governments, professional and lay people, and other members of the general public.

(c) (1) The conference shall be planned and conducted under the direction of the National Commission on Libraries and Information Science (hereinafter referred to as the "Commission").

(2) In administering this joint resolution, the Commission shall --

(A) when appropriate, request the cooperation and assistance of other Federal departments and agencies in order to carry out its responsibilities;

(B) make technical and financial assistance (by grant, contract, or otherwise) available to the States to enable them to organize and conduct conferences and other meetings in order to prepare for the Conference; and

(C) prepare and make available background materials for the use of delegates to the Conference and associated State conferences, and prepare and distribute such reports of the Conference and associated State conferences as may be appropriate.

(3) (A) Each Federal department and

agency is authorized and directed to cooperate with, and provide assistance to, the Commission upon its request under clause (A) of paragraph (2); and, for that purpose, each Federal department and agency is authorized to provide personnel to the Commission. The Commission shall be deemed to be a part of any executive or military department of which a request is made under clause (A) of paragraph (2).

(B) The Librarian of Congress is authorized to detail personnel to the Commission, upon request, to enable the Commission to carry out its functions under this joint resolution.

4) In carrying out the provisions of this joint resolution, the Commission is authorized to engage such personnel as may be necessary, without regard for the provisions of title 5, United States Code, governing appointments in the competitive civil service, and without regard for chapter 51, and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

(5) The Commission is authorized to publish and distribute for the Conference the reports authorized under this joint resolution.

(6) Members of the Conference may, while away from their homes or regular places of business and attending the Conference, be allowed travel expenses, including per diem in lieu of subsistence, as may be allowed under section 5703 of title 5, United States Code, for persons serving without pay. Such expenses may be paid by way of advances, reimbursement, or in installments as the Commission may determine.

(d) A final report of the Conference, containing such findings and recommendations as may be made by the Conference, shall be submitted to the President not later than one hundred and twenty days following the close of the Conference, which final report shall be made public and, within ninety days after its receipt by the President, transmitted to the Congress together with a statement of the President containing the President's recommendations with respect to such report.

(e) (1) There is hereby established a twenty-eight member advisory committee of the Conference composed of (A) at least three members of the Commission designated by the Chairman thereof; (B) five persons designated by the Speaker of the House of Representatives with no more than three being members of the House of Representatives; (C) five persons designated by the President pro tempore of the Senate with no more than three being members of the Senate; and (D) not more than fifteen persons appointed by the President. Such advisory committee shall assist and advise the Commission in planning and conducting the Conference. The Chairman of the Commission shall serve as Chairman of the Conference.

(2) The Chairman of the Commission is authorized, in his discretion, to establish, prescribe functions for, and appoint members to, such advisory and technical committees as may be necessary to assist and advise the Conference in carrying out its functions.

(3) Members of any committee established under this subsection who are not regular full-time officers or employees of the United States shall, while attending to the business of the Conference, be entitled to receive compensation therefore at a rate fixed by the President but not exceeding the rate of pay specified at the time of such service for grade GS-18 in section 5332 of title 5, United States Code, including traveltime. Such members may, while away from their homes or regular places of business, be allowed travel expenses, including per diem in lieu of subsistence, as may be authorized under section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(f) The Commission shall have authority to accept, on behalf of the Conference, in the name of the United States, grants, gifts, or bequests of money for immediate disbursement by the Commission in furtherance of the Conference. Such grants, gifts, or bequests offered the Commission, shall be paid by the donor or his representative to the Treasurer of the United States, whose receipts shall be their acquittance. The Treasurer of the United States shall enter such grants, gifts, and bequests in a special account to the credit of the Commission for the purposes of this joint resolution.

(g) For the purpose of this joint resolution, the term "State" includes the District of Columbia, the commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(h) There are authorized to be appropriated without fiscal year limitations such sums, but not to exceed $3,000,000, as may be necessary to carry out this joint resolution. Such sums shall remain available for obligation until expended."

Amend the title so as to read: "Joint resolution to authorize and request the President to call a White House Conference on Library and Information Services in 1977."

Mr. PELL. Mr. President, I move that the Senate concur in the House amendments with an amendment, and I send to the desk a substitute amendment.

The PRESIDING OFFICER. Without objection, the amendments will be considered en bloc.

The clerk will report the amendment.

The legislative clerk proceeded to read the amendment.

Mr. PELL. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and, without objection, the amendment will be printed in the RECORD.

The amendment is as follows:

" In lieu of the matter proposed to be inserted by the House of Representatives, insert the following:

That (a) the President of the United States is authorized to call a White House Conference on Library and Information Services in 1978.

(b) (1) The purpose of the White House Conference on Library and Information Services (hereinafter referred to as the "Conference") shall be to develop recommendations for the future improvement of the Nation's libraries and information centers and their use by the public, in accordance with the policies set forth in the preamble to this joint resolution.

(2) The Conference shall be composed of, and bring together --

(A) representatives of local, statewide, regional, and national institutions, agencies, organizations, and associations which provide library and information services to the public;

(B) representatives of educational institutions, agencies, organizations, and associations (including professional and scholarly associations for the advancement of education and research);

(C) persons with special knowledge of, and special competence in, technology as it may be used for the improvement of library and information services; and

(D) representatives of the general public.

(c) (1) The conference shall be planned and conducted under the direction of the National Commission on Libraries and Information Science (hereinafter referred to as the "Commission").

(2) In administering this joint resolution, the Commission shall--

(A) when appropriate, request the cooperation and assistance of other Federal departments and agencies in order to carry out its responsibilities;

(B) make technical and financial assistance (by grant, contract, or otherwise) available to the States to enable them to organize and conduct conferences and other meetings in order to prepare for the Conference; and

(C) prepare and make available background materials for the use of delegates to the Conference and associated State conferences, and prepare and distribute such reports of the Conference and associated State conferences as may be appropriate.

(3) (A) Each Federal department and agency is authorized and directed to cooperate with, and provide assistance to, the Commission upon its request under clause (A) of paragraph (2); and, for that purpose, each Federal department and agency is authorized to provide personnel to the Commission in accordance with section 3341 of title 6, United States Code. For the purposes of such section 3341 and this paragraph, the Commission shall be deemed to be a part of any executive or military department of which a request is made under clause (A) of paragraph (2).

(B) the Librarian of Congress is authorized to detail personnel to the Commission, upon request, to enable the Commission to carry out its functions under this joint resolution.

(4) In carrying out the provisions of this joint resolution, the Commission is authorized to engage such personnel as may be necessary, without regard for the provisions of title 5, United States Code, governing appointments in the competitive civil service, and without regard for chapter 51, and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

(5) The Commission is authorized to publish and distribute for the Conference the reports authorized under this joint resolution without regard for section 501 of title 44, United States Code.

(6) Members of the Conference may, while away from their homes or regular places of business and attending the Conference be allowed travel expenses, including per diem, in lieu of subsistence, as may be allowed under section 5703 of title 5, United States Code, for persons serving without pay. Such expenses may be paid by way of advances, reimbursement, or in installments as the Commission may determine.

(d) A final report of the Conference, containing such findings and recommendations as may be made by the Conference, shall be submitted to the President not later than one hundred and twenty days following the close of the Conference, which final report shall be made public and, within ninety days after its receipt by the President, transmitted to the Congress together with a statement of the President containing the President's recommendations with respect to such report.

(e) (1) There is hereby established a twenty-eight member advisory committee to the Conference composed of (A) at least three members of the Commission designated by the Chairman thereof; (B) two persons designated by the Speaker of the House of Representatives; (C) two persons designated by the President pro tempore of the Senate; and (D) not more than twenty-one persons appointed by the President. Such advisory committee shall assist and advise the Commission in planning and conducting the Conference. The Chairman of the Commission shall serve as Chairman of the Conference.

(2) The Chairman of the Commission is authorized, in his discretion, to establish, prescribe functions for, and appoint members to, such advisory and technical committees as may be necessary to assist and advise the Conference in carrying out its functions.

(3) Members of any committee established under this subsection who are not regular full-time officers or employees of the United States shall, while attending to the business of the Conference, be entitled to receive compensation therefore at a rate fixed by the President but not exceeding the rate of pay specified at the time of such service for grade GS-18 in section 5332 of title 5, United States Code, including traveltime. Such members may, while away from their homes or regular places of business, be allowed travel expenses, including per diem in lieu of subsistence, as may be authorized under section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(f) The Commission shall have authority to accept, on behalf of the Conference, in the name of the United States, grants, gifts or bequests of money for immediate disbursement by the Commission in furtherance of the Conference. Such grants, gifts, or bequests offered the Commission shall be paid by the donor or his representative to the Treasurer of the United States, whose receipts shall be their acquittance. The Treasurer of the United States shall enter such grants, gifts, and bequests in a special account to the credit of the Commission for the purposes of this joint resolution.

(g) For the purpose of this joint resolution, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(h) There are authorized to be appropriated without fiscal year limitations such sums, but not to exceed $10,000,000, as may be necessary to carry out this joint resolution. Such sums shall remain available for obligation until expended."

Amend the title so as to read: "A joint resolution to authorize and request the President to call a White House Conference on Library and Information Services in 1978, and for other purposes."

The PRESIDING OFFICER. The question

is on agreeing to the amendment in the nature of a substitute.

Mr. BUCKLEY. Mr. President, I offer, on behalf of myself and the distinguished Senator from Rhode Island (Mr. PELL), an amendment to the amendment that has just been offered by Mr. Pell.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

"The Senator from New York (Mr. BUCKLEY) proposes an amendment to the amendment of the Senator from Rhode Island."

Mr. ROBERT C. BYRD. Mr. President, what is the amendment? Has anyone asked that further reading be dispensed with?

Mr. BUCKLEY. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and without objection, the amendment will be printed in the RECORD.

The amendment is as follows:

" Sec. 2. (a) (1) (A) The first sentence of section 438(a) (1) of the General Education Provisions Act is amended by striking out "State and local educational agency, any institution of higher education, any community college, any school agency offering a preschool program, or any other educational institution" and inserting in lieu thereof "educational agency or institution."

(B) Such first sentence is amended by striking out "attending any school of such agency, or attending such institution of higher education, community college, school, preschool, or other educational institution" and inserting in lieu thereof "who are or have been in attendance at a school of such agency or at such institution, as the case may be."

(C) The third sentence of such section is amended by striking out "recipient" and inserting in lieu thereof "educational agency or institution."

(D) Paragraph (1) of section 438(b) of such Act is amended by striking out "State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution" and inserting in lieu thereof "educational agency or institution."

(E) Paragraph (2) of such section is amended by striking out "State and local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution" and inserting in lieu thereof "educational agency or institution."

(F) Subsection (e) of section 438 of such Act is amended by striking out "unless the recipient of such funds" and inserting in lieu thereof "to any educational agency or institution unless such agency or institution."

(G) Section 438 (a) of such Act is amended by inserting at the end thereof the following new paragraph:

"(3) For the purposes of this section the term 'educational agency or institution' means any public or private agency or institution which is the recipient of funds under any applicable program."

(2) (A) The first sentence of section 438 (a) (1) of such Act is amended by striking out "any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumlative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns." and inserting in lieu thereof "the education records of their children."

(B) (i) The second sentence of such section is amended by striking out "Where such records or data include" and inserting in lieu thereof "If any material or document in the education record of a student includes."

(ii) Such second sentence is amended by striking out "any student shall be entitled to receive, or to be informed of, that part of such record or data as pertains to their child" and inserting in lieu thereof "one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material."

(C) The third sentence of such section is amended by striking out "their child's school records" and inserting in lieu thereof "the education records of their children."

(D) Section 438 (b) (1) of such Act is amended by striking out "personally identifiable records or files (or personal information contained therein)" and inserting in lieu thereof "education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a))."

(E) Paragraph (2) of such section is amended by striking out "furnishing, in any form, any personally identifiable information contained in personal school records, to any person other than those listed in subsection (b) (1) and inserting in lieu thereof "releasing, or providing access to, any personally identifiable information in education records other than in directory information, or as is permitted under paragraph (1) of this subsection."

(F) Section 438 (a) of such Act is amended by adding at the end thereof the following new paragraphs:

" (4) (A) For the purposes of this section, the term 'education records' means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which --

" (i) contain information directly related to a student; and

" (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

"(B) The term 'education records' does not include --

"(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary, thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

"(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b) (1), the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

"(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

"(iv) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student, and are not available to any one other than persons providing such treatment; provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

"(C) Nothing in this section shall be construed to alter the confidentiality of communications otherwise protected by law as confidential.

"(5) (A) For the purposes of this section the term 'directory information' relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

"(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent."

(3) Section 438 (a) (1) of such Act is amended by inserting "(A)" after section "Sec. 438. (a) (1)" and adding at the end thereof the following new subparagraph:

"(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

"(i) financial records of the parents of the student or any information contained therein;

"(ii) confidential letters and statements of recommendation, which were placed in 1975, if such letters or statements are not the education records prior to January 1, used for purposes other than those for which they were specifically intended;

"(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations--

"(I) respecting admission to any educational agency or institution,

"(II) respecting an application for employment, and

"(III) respecting the receipt of an honor or honorary recognition; and

"(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) in the case of recommendations described in clause (iii) of such subparagraph, such recommendations are used solely for the purpose for which they were specifically intended."

(4) (A) Paragraph (2) of section 438 (a) is amended by striking out that part thereof which precedes "to insure" and inserting in lieu thereof the following: "No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order"

(B) Such paragraph (2) is amended by inserting before the period at the end thereof the following: "and to insert into such records a written explanation of the parents respecting the content of such records."

(5) Section 438 (a) of such Act is amended by adding at the end thereof the following new paragraph:

"(6) For the purposes of this section, the term 'student' includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution."

(6) Section 438 (b) (1) of such Act is amended by striking out "and" at the end of clause (C), by striking out the period at the end of clause (D) and inserting in lieu thereof a semicolon, and by adding at the end thereof the following new clauses:

"(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute;

"(F) organizations of educational agencies or institutions for the purpose of developing, validating, and administering predictive tests, if such information will not permit the identification of any person by the organization receiving such information;

"(G) accrediting organizations in order to carry out their accrediting functions;

"(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

"(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons."

(7) Section 438 (g) of such Act is amended by adding at the end thereof the following new sentence: "Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department."

(8) (A) Paragraph (1) of section 438 (b) of such Act is amended by inserting "or practice" after "which has a policy."

(B) Clause (A) of section 438 (b) (1) of such Act is amended by striking out "who" and inserting in lieu thereof ", who have been determined by such agency or institution to."

(C) Clause (B) of such section 438 (b) (1), is amended by inserting "seeks or" after "student."

(D) Section 438 (b) (3) of such Act is amended by striking out "after the data" down through "collected" and inserting in lieu thereof "by such officials or agencies."

(9) Paragraph (4) (A) of section 438 (b) of such Act is amended to read as follows:

"(4) (A) Each educational "agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1) (A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system."

(10) (A) Clause (C) of section 438 (b) (1) of such Act is amended by striking out section 409 of this Act" and inserting in lieu thereof "section 408 (c)."

(B) Section 438 (g) of such Act is amended by striking out ", according to the procedures contained in section 434 and 437 of this Act."

(b) The amendments made by subsection (a) shall be effective, and retroactive to, November 19, 1974."

Mr. BUCKLEY. Mr. President, since the enactment in October of the Family Educational Rights and Privacy Act of 1974, the educational community has pointed to certain ambiguities that have been contained in the language and provisions that because there was none of the normal legislative history, it means that HEW does not have an adequate record on the basis of which to develop the necessary regulations.

After consultation with the Senator from Rhode Island, we concluded that the most appropriate way to handle the situation would be to offer at this time the amendment I have just submitted to the desk on our joint behalf, which incorporates the necessary clarifications.

I also send to the desk at this time a statement that Senator PELL and I have agreed to, which provides a narrative and explanation of the meaning and intent of the various provisions of the amendment. I ask unanimous consent that the statement be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

"JOINT STATEMENT IN EXPLANATION OF BUCKLEY/PELL AMENDMENT

The Family Educational Rights and Privacy Act of 1974, section 513 of the Education Amendments of 1974, was signed into law by President Ford on August 21, 1974. Its provisions became effective ninety days after enactment, on November 19.

The purpose of the Act is two-fold -- to assure parents of students, and students themselves if they are over the age of 18 or attending an institution of post-secondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent. The Secretary of Health, Education, and Welfare is charged with enforcement of the provisions of the Act, and failure to comply with its provisions can lead to withdrawal of Office of Education assistance to the educational agency or institution.

Since the passage of the Act, commonly referred to as the Buckley Amendment, after its principal sponsor, a number of ambiguities in its provisions have come to light. Since the language was offered as an amendment on the Senate floor, rather than having been the subject of Committee consideration, traditional legislative history materials such as hearings and Committee reports have not been available to serve as a guide to educational institutions, to students, and to the Department of Health, Education, and Welfare in carrying out their various responsibilities under the Act. The amendments being proposed are designed to remedy certain omissions in the provisions of existing law and to clarify other portions of the Act which have been the subject of extensive questioning and concern. It is the hope of the sponsors of these amendments that they provide a suitable response to the issues surrounding existing law which have been raised by parents, students, and institutions.

Existing law lists specifically, at several points in the Act, the institutions and agencies to which the provisions apply. However, these lists are not always identical, creating questions of the applicability of the Act to certain institutions under certain circumstances. The amendment, to standardize the Act's applicability, defines the term "educational agency or institution" as any public or private agency or institution which is the recipient of funds under any applicable program. This definition serves to clarify a number of issues. First, it makes uniform the Act's applicability under all its subsections, so that no question remains of a school's inclusion under one part of the Buckley Amendment but not under another. Second, by defining the term generically rather than specifically, the amendment eliminates the possibility that any agency or institution not meeting the specific definition might fall outside the Act's coverage. Finally, by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration. The entire Buckley Amendment is an amendment to Part C of the General Education Provisions Act, which by its own terms applies only to the Office of Education. However, there has been some question as to whether the Amendment's provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act's coverage should be clear.

Under the Family Educational Rights

and Privacy Act, a parent is given the right to challenge the contents of his child's records to insure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights. This provision, section 438 (a) (2) of the General Education Provisions Act, has raised the number of questions which these amendments seek to answer -- 1) who has the right to challenge, 2) what records are covered, and 3) what sort of proceeding should be undertaken.

First, these amendments clarify that the parent need not have a child still in attendance at the educational agency or institution at the time a hearing is sought in order to have the right to seek a hearing on the accuracy or appropriateness of material in his child's file. The Buckley Amendment does give parents the right to challenge the content of records once their children have left the school possessing the records in order to assure that records still maintained by the school which could subsequently become available to parties outside the school do not contain inaccurate or inappropriate material.

In addition, the material subject to challenge is defined generically as "education records," eliminating the long list of illustrative examples contained in existing law. "Education records" are described as those records, files, documents, and other materials directly related to a student which are maintained by a school or by one of its agents. This definition is a key element in the amendment. An individual should be able to know, review, and challenge all information -- with certain limited exceptions -- that an institution keeps on him, particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution. This is especially true when the individual is a minor. Parents need access to such information in order to protect the interest of their child.

The amendment makes certain reasonable exceptions to the access by parents and students to school records. The private notes and other materials, such as a teacher's daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another's duties for a temporary period.

The law enforcement records of a law enforcement unit associated with a school would be excluded if its personnel are not allowed access to a student's education records, and if its records on a student are used solely for law enforcement purposes and are only available to other law enforcement officials of the same jurisdiction.

The employment records of a person not attending a given school would not be available to him, even though he has been a student at another school, if they are used for other than employment purposes.

College students would not be able directly to inspect medical psychiatric, or similar records which are used solely in connection with treatment purposes and only available to recognized professionals or para-professionals in connection with such treatment. Such students would, however, be able to have a doctor or other professional of their choice inspect their records.

The amendment also notes that the law does not alter the confidentiality of communications otherwise protected by law.

The law is not specific concerning the format, procedure, or mechanism for the conduct of such a hearing at the local level. It is the intent of the sponsors of these amendments that again a rule of reason would be followed by those participants involved. Since the hearing is to be conducted at the local level, a detailed specification of procedures cannot be drawn that could possibly apply to each of the thousands of school districts and colleges across the nation. Each has a slightly different organizational structure and pattern of procedure. Obviously, the hearing mechanism must be adapted in each instance to conform to these individual differences. In some cases, a school district might wish to offer the parent a hearing at the district level; in other instances, disputes about the content of records might be better handled at the local school level. It is not the intent of the Amendment to burden schools with onerous hearing procedures.

The amendment is intended to require educational agencies and institutions to conform to fair information recordkeeping practices. It is not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution. It is intended, however, to open the bases on which decisions are made to more scrutiny by the students, or their parents about whom decisions are being made, and to give them the opportunity to challenge and to correct -- or at least enter an explanatory statement -- inaccurate, misleading, or inappropriate information about them which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution.

The law intends that parents have a full and fair opportunity to present evidence to show that their children's records contain inaccurate, misleading or otherwise inappropriate information. The hearing should be held and the institution's decision rendered within a reasonable period after the parent's request. There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to correct an improperly recorded grade, but could not, through the hearing require pursuant to this law, contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade.

On the other hand, if a child has been labeled mentally or otherwise retarded and put aside in a special class or school, parents would be able to review the materials in the record which led to this institutional decision, and perhaps seek professional assistance, to see whether these materials contain inaccurate information or erroneous evaluations about their child.

In general, it is intended that the parent would be shown the actual documents contained in the child's education records. However, under certain circumstances, this might not be possible -- where, for instance, it is impossible to separate information about one student from that about others. If a student's name is one in a long list of names, it would violate the others' right to privacy to have the entire list shown to that student's parents. In such a situation, the responsibility of the educational agency or institution is to make the information concerning the student known to the parent, without actually having to show him the document.

Existing law prohibits the furnishing of identifiable information contained in school records to other than a specific list of persons, primarily other school officials without the written consent of the student's parents or that of the student when he becomes 18 or enters postsecondary education. A literal interpretation of this has led school attorneys around the country to advise their clients no longer routinely to print football players' weights in athletic programs and to seek written consent of the cast of the school play that their names may be printed in the program. This narrow reading of the law is not what its author intended to achieve, and he so stated during the floor debate in May on the amendment.

Therefore, these amendments specifically provide that a school may safely provide what is termed "directory information" -- such personal facts as name, address, and telephone numbers -- to third parties without fear of having its Federal funds withdrawn. The institution providing such directory information would be required to give public notice of the information it planned to make available to the general public, and to allow parent time to notify the institution that any or all of that information should not be released. This would allow parents with unlisted telephone numbers, for example, to have the right to keep such numbers unlisted.

On the other hand, clarification of the definition of "directory information" can be significant in allowing the functioning of other programs. For example, under the Guaranteed Student Loan Program, a student is allowed a nine-month grace period after his last date of attendance before his is required to begin repayment of his obligation. If a school cannot routinely inform the lender of the student's last date of attendance, the lender has no basis for calculating when he may begin to collect the loan. These amendments would avoid this problem by making such information available on a routine basis, without a requirement that the student give his consent.

Much concern has been expressed by institutions of higher education concerning the potential impact of the Buckley Amendment on the number of traditional institutional practices. For instance, letters of recommendation for admission are usually solicited under a promise that such letters will not be available to the student, to his parents, or to third parties not associated with the purpose of the recommendation. What is their status if they become part of a student's permanent official file? Also, in conjunction with an application for student financial aid, a parent may have to file a financial statement. Should a student be given the right to see such a statement? If a student has acquired rights under the Amendment, can an institution require or suggest that he waive those rights and preserve the confidentiality of its files? These amendments seek to answer these and other questions.

A number of exceptions to the blanket right to see and challenge education records are made for students attending institutions of postsecondary education. They shall not have the right, under the provisions of the Amendment, to see financial records of their parents. They shall not have the right to see confidential letters and statements of recommendation placed in education records prior to January 1, 1975, provided that they are not used for purposes other than those for which they were intended. And students may waive their rights of access to confidential recommendations in three areas -- admissions, job placement, and receipt of awards. To protect students from wholesale abuse of such continued possibility of confidentiality, the amendments require that a student be notified of the names of all persons making confidential recommendations, if he does agree to waive his right of access. This notification would include not only those individuals suggested by the student as possible references, but also any others solicited by the institution or volunteering their comment.

With regard to letters of recommendation for a student in an institution of postsecondary education, two further clarifications are included. The use of confidential recommendations is limited solely to the purpose for which they were specifically intended. Such recommendations should not become a part of the student's on-going file and serve as a basis for continued official decision-making for purposes other than for which such letters were originally submitted. Second, the "student" to whom the right of access belongs is defined as any person concerning whom the educational agency maintains education records or personal information, but does not include anyone who has not been in attendance at such agency or institution. This means that the rejected applicant for admission is not given the right under the Buckley Amendment to see and challenge his letters of recommendation, nor does the amendment give him the right to challenge the institution's decision not to admit him. Such a right accrues only to the individual who actually attends the institution. For the purpose of this definition, a student who is only auditing a course, but on whom the institution maintains a personal file, would be included in the Amendment's coverage.

Section 438 (b) (1) of existing law restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to other educational agencies or institutions, other school officials, auditors from the General Accounting Office and the Department of Health, Education, and Welfare, and in connection with the application for or receipt of student financial aid under certain specified conditions. It has become apparent in the last several months that these restrictions are too narrow and, if strictly applied, would seriously interfere in the operation of educational institutions. Therefore, after consultation with numerous educational representatives as well as students, the authors of these amendments have included a series of other potential recipients of student information, without the necessity of securing individual parents' consent.

First, these amendments permit the transmittal of personal information to State and local officials or authorities as required by State statute. It was not intended, in establishing a minimum Federal standard for record confidentiality and access, to preempt the States' authority in the field. Therefore, if a State law requires an educational official to transmit a specific piece of information about a student to State or local officials, or liberalizes a student's access to his own education records even farther than the Family Educational Rights and Privacy Act, such as in Maine, Idaho, and New Mexico, where the law permits students of any age to see their records, State law may be followed without securing a parent's specific consent. Of course, the provisions of the amendment do not affect whatever rights a student or his parents might have in civil proceedings, as in the case where confidentially-received material causes the student or his parents actionable damage.

Organizations such as the Educational Testing Service, the Law School Admissions Council, the College Entrance Examination Board, and the American Medical College Application Service, and others, develop and validate a number of tests which are used by institutions of higher education to predict the potential success of applicants for admission. These and other similar groups need student data in order to perform their function. The amendments would authorize release of such data to these organizations without individual parents' or students' consent, so long as the data are not personally identifiable to the individuals and organizations receiving such data.

Similarly, accrediting agencies form the basis for institutional eligibility to participate in a wide range of Federal assistance programs. In order to assess the quality of an institution's program and the strength of the institution itself, the agency must have access to certain confidential student data. The amendments would authorize such access to enable the accreditor to carry out its functions.

One concern that has been expressed about the working of existing law pertains to the transfer of all parental rights to information to the student about the latter's attaining the age of 18 or enrolling in postsecondary education. Colleges have been reluctant to send bills or grades of their students to the students' parents, for fear of violating the students' rights. The amendments proposed would make it clear that the parent of a dependent student, as defined for income tax purposes, would have a right to information about his child without the institution's having to seek the students' consent.

Finally, under certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In the case of the outbreak of an epidemic, it is unrealistic to expect an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for "health or safety" could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.

Because of the concern that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions, the amendment authorizes that only activities involving the conduct of hearings by the Secretary's review board may be carried out in the regional offices of HEW.

The remainder of the amendment is purely technical in nature, correcting erroneous cross-references found in existing law which were created as a result of changes made in the bill on the floor of the Senate and in conference. The provisions of the amendment are retroactive to November 19, 1974, the date on which the Family Educational Rights and Privacy Act became effective.

With guidelines not yet published, the provisions of the Act, and its ramifications have been the subject of much uncertainty, causing perplexity among school officials and frustrations among parents and students. It is the hope of the sponsors of this amendment that it will do much to, clear up many of the unanswered questions, so that the substance of the provisions may be carried out in schools and colleges across the country as soon as possible, and so parents and students may properly begin to exercise their rights under the law, and the protection of their privacy may be assured."

Mr. MONDALE. Mr. President, I am somewhat concerned as are Senator WILLIAMS and Senator JAVITS about the provision of this amendment that would permit students to waive their rights to confidentiality of or access to their records. Under the provisions of this amendment would a postsecondary institution be permitted to require, as a condition of application, acceptance, or any other service normally provided to students at the institution, that a student sign such a waiver?

Mr. PELL. There is nothing in the proposed language which would permit an institution to require such a waiver as a precondition of application, or any other service normally provided to students at the institution.

Mr. MONDALE. Would there be any conditions under which an institution could compel any of its students to sign such a waiver?

Mr. PELL. Under the proposed language an institution would be permitted to request such a waiver of applicants or students but would not be permitted to require that the student waive his rights to either the confidentiality of his records, or his access to those records as a precondition to enrollment or matriculation or any other service normally provided to students at the institution under any circumstances.

Mr. MONDALE. Could a postsecondary institution request a student, at time of application for admission, or any time thereafter, to sign a general waiver which would effectively waive the student's rights to examine any recommendations at any time in the future? For example, under the proposed language, confidential statements or recommendations are split into three classes: Recommendations for applications of admission, for employment, and for honors or awards. Would, then, a postsecondary institution have to request the waiver for each of those classes of recommendations at the appropriate time?

Mr. PELL. A postsecondary institution could not request a general waiver which would apply for all time, but would have to ask for a waiver at the appropriate time for each class of confidential statement or recommendation.

Mr. BUCKLEY. Mr. President, in the course of the past weeks, the Senator from Rhode Island and his staff and my staff and I have been in frequent contact about the questions and problems which have arisen regarding the act. We have discussed the problems with representatives of the various educational groups and institutions, student groups, and public interest organizations. We have received a great deal of valuable information and suggestions, and I believe we have succeeded, after many hours of working together, to incorporate them all in language that I believe will meet every legitimate question that has been raised about the proposed legislation.

At this time, I should like to take occasion to express my deep personal appreciation of the tremendous spirit of cooperation and understanding that has been extended to me by the distinguished chairman of the subcommittee and to express my appreciation for his enormous sense of fairness.

Mr. PELL. Mr. President, I thank the Senator from New York.

I fully support and am, indeed, the cosponsor of the series of amendments offered by Senator BUCKLEY to the Family Educational Rights and Privacy Act. The Senator has introduced into the RECORD an agreed upon explanation of the amendments we have prepared which will serve as legislative history in interpreting the language of the amendments. I will, at a suitable point in the RECORD ask unanimous consent for the printing of a document which in a report on legislation would be termed a cordon print. It will show the changes in the existing law; what has been deleted and where the new language fits and how it will be read after adoption of these amendments.

I wish to thank Mr. BUCKLEY for his most cooperative attitude over the past 2 months. Since the first week of October, I have been in contact with him numerous times over certain interpretations of the law.

There was some thought given to deferring the effective date of the law, but we, after numerous discussions decided on a series of amendments which will amend the law so that parents, students, and institutions could better interpret the provisions and exercise their rights under them.

Senator BUCKLEY and I have spent many hours working over the specific language changes. These amendments are not intended to deal with every single issue which has been raised. I fully expect that as students and institutions attempt to deal with the amended law further questions could arise. The Subcommittee on Education could well have oversight hearings on this matter next year after the law has been in operation.

In any event, I again thank Senator BUCKLEY for his actions on this matter.

I ask unanimous consent to have printed in the RECORD the document I have referred to.

There being no objection, the document was ordered to be printed in the RECORD, as follows:

CHANGES IN EXISTING LAW

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

Sec. 438 (a) (1) No funds shall be made available under any applicable program to any [State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution] *educational agency or institution* which has a policy of denying, or which effectively prevents, the parents of students [attending any school of such agency, or attending such institution of higher education, community college, school, preschool, or other educational institution,] *who are or have been in attendance at a school of such agency or at such institution, as the case may be* the right to inspect and review [any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores,) attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.] *the education records of their children* [Where such records or data include] *If any material or document in the education record of a student includes* information on more than one student, the parents of [any student shall be entitled to receive, or be informed of that part of such record or data as pertains to their child] *one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.* Each [recipient] *educational agency or institution* shall establish appropriate procedures for the granting of a request by parents for access to [their child's school records] *the education records of their children* within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) *The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:*

(i) financial records of the parents of the student or any information contained therein;

(ii) *confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;*

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations ---

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and,

(III) respecting the receipt of an honor or honorary recognition; and

(C) A student or a person applying

for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) in the case of recommendations described in clause (iii) of such subparagraph, such recommendations are used solely for the purpose for which they were specifically intended.

(2) [Parents shall have an opportunity for a hearing to challenge the content of their child's school records.] *No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order* to insure that the records are not inaccurate, misleading, or otherwise, in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein *and to insert into such records a written explanation of the parents respecting the content of such records.*

(3) For the purpose of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which --

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

(B) The term "education records" does not include --

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b) (1), the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution, but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment; provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(C) Nothing in this section shall be construed to alter the confidentiality of communications otherwise protected by law as confidential.

(5) (A) For the purposes of this section, the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

"(b) (1) No funds shall be available under any applicable program to any [State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution] educational agency or institution which has a policy or practice of permitting the release of [personally identifable records or files (or personal information contained therein)] *education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a))* of students without the written consent of their parents to any individual, agency, or organization, other than to the following --

(A) other school officials, including teachers within the educational institution or local educational agency [who], *who have been determined by such agency or institution to* have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or, intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section [409] 408(c) of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute;

(F) organizations of educational agencies or institutions for the purpose of developing, validating, and administering predictive tests, if such information will not permit the identification of any person by the organization receiving such information;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

(2) No funds shall be made available under any applicable program to any [State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution] *education agency or institution* which has a policy or practice of [furnishing, in any form, any personally identifiable information contained in personal school records, to any present other than those listed in subsection (b) (1)] *releasing, or providing access to any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection* unless --

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That, except when collection of personally identifiable data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents [after the data so obtained has been collected] *by such officials or agencies.*

[(4) (A) With respect to subsections (c) (2) and (c) (3), all persons, agencies, or organizations desiring access to the records of a student shall be required to sign a written form which shall be kept permanently with the file of the student, but only for inspection by the parents or student, indicating specifically the legitimate education or other interest that each person, agency, or organization has in seeking this information. Such form shall be available to parents and to the school official responsible for record maintenance as a means of auditing the operation of the system.]

(4) (A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1) (A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program [unless the recipient of such funds] to *any educational agency or institution unless such agency or institution* informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section [according to the procedures contained in sections 434 and 437 of this Act]. *Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department."*

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from New York and the Senator from Rhode Island.

The amendment was agreed to.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Rhode Island to concur in the House amendment with an amendment.

The motion was agreed to.

Mr. PELL. Mr. President, I move that the Senate insist upon its amendments and ask for a conference with the House, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer (Mr. WILLIAMS) appointed Mr. PELL, Mr. RANDOLPH, Mr. WILLIAMS, Mr. KENNEDY, Mr. MONDALE, Mr. EAGLETON, Mr. CRANSTON, Mr. HATHAWAY, Mr. DOMINICK, Mr. JAVITS, Mr. SCHWEIKER, Mr. BEALL, and Mr. STAFFORD conferees on the part of the Senate.

SENATOR BUCKLEY'S ADDRESS BEFORE THE LEGISLATIVE CONFERENCE OF THE NATIONAL CONGRESS OF PARENTS AND TEACHERS

Mr. BUCKLEY. Mr. President, no long ago I addressed the legislative conference of the National Congress of Parents and Teachers -- PTA on the reasons and beliefs that prompted me to introduce the Family Educational Rights and Privacy Act of 1974. Because I have had many inquiries from the public and from congressional offices on this subject, I ask unanimous consent that the text of my remarks be printed in the RECORD.

There being no objection, the remarks were ordered to be printed in the RECORD, as follows:

SPEECH OF SENATOR JAMES L. BUCKLEY BEFORE THE LEGISLATIVE CONFERENCE OF THE NATIONAL CONGRESS OF PARENTS AND TEACHERS, MARCH 12, 1975.

I very much appreciate the opportunity to address this meeting of the National Parent-Teachers Association. Few organizations in the country are more important than yours. I say this as father of six children who shares your belief that education is too important to be left to the educators; that the family has and must continue to play a vital, dominate role in education, both for the good of the children and for the good of society as a whole.

In that PTA's 75 year history, it has been a vital link between parents and teachers, and it has served the nation's children well.

I understand you would like me to discuss briefly the reasons and beliefs that prompted me to introduce the Family Educational Rights and Privacy Act, better known as the Buckley Amendment, and I am happy to do so. When I introduced the bill in the form of an amendment to the bill extending the Elementary and Secondary Education Act, I obviously thought it was an important measure -- but I didn't expect it to generate such strong support and interest -- or so many brickbats.

The immediate reason for the legislation was, of course, the growing evidence of the abuse of student records across the nation. Thousands of letters detailing these abuses have been sent by irate parents and students to such organizations as the Russell Sage Foundation, the National Committee for Citizens in Education, and the American Civil Liberties Union. The Russell Sage Foundation undertook a survey of record-keeping practices of representative school districts in the nation in the late 1960's. Partly as a result of this survey, the Foundation convened a conference of prominent educators, lawyers, and social scientists to consider the ethical and legal aspects of school record-keeping, and to develop guidelines for the collection, maintenance, and dissemination of these records. Among the abuses which the conference report pointed to were the following:

"Pupils and parents typically have little or, at best, incomplete knowledge of what information about them is contained in school records and what use is made of this information by the school.

"Parental and pupil access to school records typically is limited to the pupil's attendance and achievement record (including standardized achievement test scores).

"The Secrecy with which school records usually are maintained makes difficult any systematic assessments of the accuracy of information contained therein. Formal procedures permitting parental or pupil challenges of allegedly erroneous information do not exist. An unverified allegation of misconduct may therefore . . . become part of a pupil's permanent record.

"Procedures governing the periodic destruction of out-dated or no longer useful information do not exist in most systems.

"Within many school systems, few provisions are made to protect school records from examination by unauthorized school personnel.

"Information about both pupils and their parents is often collected by schools without the informed consent of either children or their parents. Where consent is obtained for the collection of information for one purpose, the same information is often used subsequently for other purposes.

"Access to pupil records by non-school personnel and representatives of outside agencies is, for the most part, handled on an ad hoc basis. Formal policies governing access by law-enforcement officials, the courts, potential employers, colleges, researchers and others do not exist in most school systems."

"Sensitive and intimate information collected in the course of teacher-pupil or counselor-pupil contacts is not protected from subpoena by formal authority in most states."

The recommendations of the Conference in large part formed the basis of my amendment.

It was found that, while FBI agents and juvenile court and health department officials had access to the entire records -- including sensitive psychological reports -- in more than half the school systems surveyed and the local police in a third of them, parents were allowed access in less than 10 percent of the school system. When a halt was called to the routine release of student information in New York City several years ago, no fewer than 28 separate and distinct categories of outsiders called the board of education to complain that their usual sources of information about students had been cut off.

One of the more serious abuses has been the insertion of potentially prejudicial anecdotal comments and factual inaccuracies into children's school records. When parents and students are not allowed to inspect school records and make corrections such material can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student. A simply inaccuracy or a comment by a spiteful, neurotic teacher can potentially ruin a student's future.

Access to their children's school records is particularly important when schools pin often questionable labels such as "mentally retarded" or "potential delinquent" on children and propose to isolate them in special classes. I know that the PTA has a particular interest in this problem.

A not untypical case was reported in New York, where the parents of a junior high student were told their daughter would not be able to attend graduation ceremonies because she was a "bad citizen." What did she do that was bad, the parents asked. Well, the principal said, the school had a whole lot on her "poor citizenship," but the parents would not be allowed to examine that file. In this Catch-22 case, one of the few to get a hearing, the State Commissioner of Education, Ewald B. Nyquist, stated flatly that the school's argument that it was acting in best interest of the student in refusing to reveal the information to the parents -- had merit. The Commissioner concluded: "It is readily apparent that no one had a greater right to such information than the parents."

More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. There has been clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations. In addition, the growth of the use of computer data banks on students and individuals in general has threatened to tear away most of the few remaining veils guarding personal privacy, and to place enormous, dangerous power in the hands of the government, as well as private organizations. It was, therefore, most appropriate that the Congress saw fit to enact the Family Educational Rights and Privacy Act, as well as the landmark Federal Privacy Act of 1974, which establishes similar rights and protections of privacy to individuals on whom the federal government keeps files.

Another essential reason for my introduction of this bill is my belief in fair information practices. An individual should be able to know, review, and challenge all information -- with certain limited exceptions -- that an institution keeps on him, particularly when the institution may use such information when making important decisions regarding the individual's future, or may transmit such personal information to parties outside the institution. This is particularly true when the individual is a minor. Parents most certainly need access to such information and records in order to protect the interests of their children. It is this that my legislation, as adopted, now makes possible.

A commission established at the Department of Health, Education and Welfare to review automated Personal Data Systems has drawn up a "code of Fair Information Practices" which rests on five basic principles:

There must be no personal data record keeping systems whose very existence is secret;

There must be a way for an individual to find out what information about him is in a record and how it is used;

There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes with his consent;

There must be a way for an individual to correct or amend a record of identifiable information about him;

Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.

It is in the context of the principles of Fair Information Practices that the appropriateness of the application of the law to higher education and college students becomes readily apparent.

I had hoped my legislation would accomplish even more. As you perhaps know, not all of my original amendment was passed. A key section of it was defeated in the Senate by two votes -- only one if you discount the Senator who mistakenly voted against it because of confusion on the floor at the time. That section would have required parental consent before a child undergoes certain forms of testing or treatment, such as psychiatric, or divulges sensitive personal or family information, or partakes in certain behavior or value-changing courses or activities.

In addition, it required that parents be informed of the intended participation of their child in out-of-the ordinary research or experimentation projects. In some instances, children are required to participate in experimental education programs, in medical research, or in programs or activities designed to affect their personal behavior, values, or social development -- without their parents' adequate knowledge or consent. The Children's Defense Fund, headquartered here in Washington, has documented many disturbing cases of such abuses across the country.

Many schools do not ask parents' permission to give personality or psychiatric tests to their children, or to obtain data from the children on their parents and family life. Some of these tests include questions dealing with the most personal feelings and habits of children and their families. Some of this data, in personally identifiable form, is given to other government agencies or to private organizations. Some of it ends up on Federal computers in the caverns of the Department of Health, Education, and Welfare. A year ago this March, a Federal office demanded information on pupil and family ethnic attitudes from over 100,000 New York City's elementary school pupils. Fortunately, the city board of education adamantly refused, even in the face of a reported threat to cut off all Federal education funds -- over $200 million a year -- to the city.

Attempts are made, of course, to excuse the collection and dissemination of such "data," which is in most cases not accessible for review by parents or students, on the basis that this is not done "in the best interest of the student." In my own State, the Parent-Teachers Association has rejected such assertions, and has taken a strong stand against these abuses, and has called for their correction. The attitudes of secrecy and the denial of the right of parents to find out what is being done to, asked of, and taught to their children in school, reflect a shocking degree of arrogance on the part of many in the educational establishment.

The requirements of parental consent would inform parents about controversial programs, and would offer them and their children the best protection I can think of against possible educational abuses.

I plan to reintroduce the defeated

section of the amendment as a separate bill. I hope that the National Congress of Parents and Teachers will, in its wisdom, be able to offer its support for the passage of this legislation.

This brings me to the most fundamental reason for having introduced the Family Educational Rights and Privacy Act: and that is, my firm belief in the basic rights and responsibilities -- and the importance -- of parents for the welfare and the development of their children. Parents are the first and most important teachers of their children. As Dr. Earl Schaefer, the University of North Carolina's high respected child development and education specialist, has remarked:

"The amount of parental involvement in the child's education may explain up to four times as much of the variance in the child's intelligence and achievement test scores at age eleven as the quality of the schools . . . in a national sample of 5,000 children in England, (it was) found that parent interest and involvement with the child's education were far more important than the quality of schools, even after statistically controlling for family socio-economic status."

Yet, some educators seem to feel that they know much more about the welfare and best interests of the child than do the parents; and therefore, once a child comes under their sway, they think they have the right to do what they themselves think is best for the child, without regard for the values and beliefs and opinions of the parents. Some educators seem to have forgotten that parents have the primary natural, legal and moral responsibility for the upbringing of their children, and to transfer them to the State -- to separate figuratively, and in some cases, literally, the child from his parents, and to turn him over to the care of the State, as represented by schools, pre-school centers, and other arms of its administration.

There has been an increasing chorus of complaints from parents in the last few days about just such attitudes and actions on the part of some educators. The sense of a loss of control over one's life and destiny, which many social commentators say is growing amongst our citizens, seems to be increasingly felt by parents with respect to the upbringing of their own children.

I believe that the recent disturbances over textbooks used in West Virginia reflect this feeling and are in fact symptomatic of a far more pervasive disenchantment with and alienation from the schools on the part of the public than is realized. In large part this has resulted from the tendency of the educational community to deny parents information and decision-making responsibilities regarding their children's education. As Jerry Abbott, a school principal in North Dakota, has written:

"We are not, and never have been, committed to the development of a partnership in education with parents. The school has too often viewed parental involvement as an intrusion. Parents send their children to school feeling that the professionals know best, and in that kind of relationship many real possibilities of growth are lost."

I introduced the Family Educational Rights and Privacy Act not only to correct certain abuses in the schools but also to reassert and re-establish the basic rights, responsibilities and involvement of parents in their children's upbringing and education.

As regards implementation of the law, I am confident that the vast majority of schools will seek to comply with it in good faith. Of course, there will be some difficulty and uncertainty at first, but in time appropriate procedures should be worked out, although it may take awhile for some individuals to adjust their attitudes towards increased openness with parents. HEW issued a set of proposed regulations for the law in record time, and within the next few months the final regulations will be issued, leavened by the recommendations offered during the extended public comment period.

There will be instances where certain schools and administrators will attempt to circumvent the law. In such cases, it is particularly important that local organizations such as the PTA take a leadership role in monitoring compliance with the law, in recording cases of violations, and in bringing such evidence to the attention of the appropriate local, state or federal authorities.

Equally important as the other expected effects of the new law is the real possibility that the obligation to provide parents with more information about their children's education will begin to close the gap of hostility and mistrust that too often exists between parents and teachers. The increased openness and communication with parents on the part of the schools which should follow from the laws should enhance parental involvement and interest in their children's education, and in the long run should lead to better educated youngsters, and more harmonious school-community relations.

Here again the role of the local PTAs is vitally important. The challenge and the opportunity that face local PTAs is to take the lead in overcoming hostilities and mistrust where they exist and in closing the too frequent gaps between the community and the school. This can be done by encouraging greater interaction, understanding, and cooperation between the home and the school, and by making parents partners in education through promoting greater parental involvement in the educational process, in the school and in the home.

Surely this is what thoughtful parents and educators all seek. It is one of the major objectives of the PTA, namely, "To bring into closer relation the home and the school, that parents and teachers may cooperate intelligently in the education of children and youth."

In closing let me take this opportunity to express my admiration for the strong stand in favor of privacy which the National PTA has taken, and my deep appreciation for your enthusiastic and invaluable support for the Family Educational Rights and Privacy Act during its birth and through the critical period of its history last fall. Your encouragement helped give us the strength to persist in our efforts to protect the rights and privacy of America's families. I look forward to associating and working with you again on this and other projects in the future.

Title 45 -- Public Welfare

SUBTITLE A -- DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

Part 99 --PRIVACY RIGHTS OF PARENTS AND STUDENTS

Final Rule on Education Records

Notice of proposed rulemaking was published in the FEDERAL REGISTER on January 6, 1975 at 40 FR 1208 setting forth the requirements to be met by an educational agency or institution to protect the privacy of parents and students under section 438 of the General Education Provisions Act, as amended (added by section 513 of Pub. L. 93-380 and amended by section 2 of Pub. L 93-568).

Three hundred and twenty-one letters of comment were received during the 60-day public comment period which closed on March 7, 1975. All comments were given consideration during the revision of the regulations, the first segment of which was published in final form on March 2, 1976 at 41 FR 9026. This document supersedes the previously published final regulation. The revoked regulation has been incorporated for republication at subparts A (Sections 99.2 and.3), C (Sections 99.21-23), and D (Sections 99.31 and .36) of this document, in order to provide the public with a single document containing all regulatory provisions pertaining to the Family Educational Rights and Privacy Act.

While the Department unquestionably supports the purpose of the law -- to provide greater privacy safe-guards to parents and students through the application of fair information practice -- during the course of developing this final regulation it became evident that translating this intent into practice might create a number of problems. For our part, there was a conscious effort to mitigate any dislocating effects which the regulation might have and, at the same time, remain consistent with the statute.

We believe that some working experience with this regulation will be helpful to the Department in determining whether there is a need to modify this regulation or whether a recommendation for legislative change may be either necessary or appropriate.

As a result, the regulation is being issued in final form, effective upon publication, with the commitment that comments on the regulation and its operation, including its effect on the day-to-day activities of educational agencies and institutions during the 1976-77 school year, will be formally invited for a ninety-day period commencing July 1, 1977. These comments will be used in evaluating this regulation and will be shared with the Congress, as may be necessary, in order to improve the effects and effectiveness of the regulation and the statute upon which it is based.

In addition to welcoming comments on the substance of these regulations, the Department will also solicit public comment regarding the most appropriate means of enforcing the provisions of the Act. Regarding the means of enforcement available to the Department, while educational agencies and institutions are accountable for Federal funds they receive and must act in conformity with Federal law, the practice of using the expenditure of Federal funds as leverage may not be the most effective way to accomplish the objections of this statute. We would be interested in your views as to whether other more appropriate means of enforcement than institutional fund cutoff are or should be available.

ANALYSIS OF EARLIER COMMENTS

A summary of the major comments received follows in order of the sections numbered as in the final regulations. Each summary of comments is followed by a response which indicates whether or not a change has been made in the regulations. Technical changes, such as the renumbering of sections, are listed under other changes at the end of each section or subpart.

SUBPART A -- GENERAL

1. Section 99.1 *Applicability of part.*

Comment. A commenter suggested that the determination as to whether or not an educational agency or institution would be required to comply with section 438 of the Act and this part should be based on the actual receipt of funds and not on whether funds have been made available under an applicable program.

Response. Sections 438 (a) (1) (A), (a) (2), (b) (1), and (b) (2) state that "no funds shall be made available under any applicable program to any educational agency or institution . . ."; therefore, no change has been made in the regulations. However, the term "available" should be read in this context as referring to funds which have been obligated by the U.S. Commissioner of Education.

Comment. Several commenters indicated that it would be helpful to have a list of Federal programs administered by the U.S. Commissioner of Education. One commenter suggested that the list of programs be published as part of the regulations.

Response. It was determined that it would not be feasible to publish a list of Federal programs administered by the Commissioner as part of the regulations because any such list would be subject to change and tends to become out-of-date soon after it is published.

A list of programs administered by the Commissioner as of March 1975 was published at 40 FR 10503-5 (March 6, 1975) and is available as a reprint from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

Comment. Several commenters indicated they felt that if an educational agency or institution or students in attendance at the educational agency or institution received funds under any Federal program, the agency or institution should be required to comply with section 438 of the Act and this part.

Response. The statutory language limits coverage to educational agencies and institutions to which funds are made available under programs administered by the U.S. Commissioner of Education. Section 438 was an amendment to Part G of the General Education Provisions Act, as amended. Section 421 of Part C states that:

"The provisions of this part shall apply to any program for which the Commissioner has administrative responsibility, as specified by law or by delegation of authority pursuant to law." In addition, the *Joint Statement in Explanation of Buckley/Pell Amendment (Congressional Record* at § 21488, daily edition, December 13, 1974) stated in part:

"By explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration . . . There has been some question as to whether the amendment's provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act's coverage should be clear."

Comment. A commenter asked if an educational agency or institution would be required to comply with Section 488 of the Act and this part of students in attendance at the agency of institution received funds under an applicable program administered by the Commissioner, such as the Basic Educational Opportunity Grant program, the Direct Student Loan program, or which has students who receive funds under the Basic Educational Opportunity Grant program or the guaranteed Student Loan Program.

2. Section 99.3 *Definitions.*

Comment. Several commenters asked for clarification as to whether directory information included only the enumerated information, or if additional information could be designated as directory information.

Response. The definition of directory information has been modified to conform with the statutory definition: that is, that it "includes" the enumerated information. For guidance as to what further information could be included, the phrase ". . . and other similar information" has been added to the definition.

Comment. Several commenters recommended that the definition of education records be changed. The single suggestion most often made was that the term "school records" be used in place of "education records," and that school records and non-school records be defined by their origin.

Response. Section 438 (a) (4) (A) defines education records as "* * * those records, files, documents, and other materials which * * * contain information directly related to a student; and * * * are maintained by an educational agency or institution, or by a person acting for such agency or institution." Section 438 (a) (4) (B) (i) through (iv) list those records which are not considered to be education records if conditions are adhered to by an educational agency or institution in the maintenance of the records. The statute does not provide for a differentiation between records maintained by an educational agency or institution based on the origin of those records.

Comment. Several commenters asked for clarification regarding what was meant by "institutional" in the definition of education records at section 438 (a) (4) (B) (i).

Response. The word "institutional" appeared incorrectly in the copy of section 438 of the Act reprinted as a part of the proposed rules. The correct word was "instructional." The phrase at section 438 (a) (4) (B) (i) should have stated " * * * records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto. * * *"

Comment. Several commenters asked that the term "substitute" used in the definition of education records be defined.

Response. The term "substitute" in the definition of education records has been defined as "* * * an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position."

Comment. Several commenters asked for clarification as to what was meant by "same jurisdiction" in the definition of education records at section 438(a) (4) (B) (ii).

Response. Since the meaning may vary under applicable State law and factual situation, no attempt has been made to define by regulation the term "same jurisdiction."

Comment. Several commenters asked that the term "financial aid" be defined in the regulations.

Response. A definition of "financial aid" has been included. The definition states "a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution.

Comment. Several commenters asked for clarification regarding who could exercise parental rights and responsibilities on behalf of a student. Particular concern was expressed about whether a foster parent or other individual could act on behalf of a student.

Response. The definition of "parent" has been modified to include, in some instances, an individual who may not be the legal guardian of a student. The definition as revised states "'Parent' includes a parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that a State law, a court decree, or a legally binding instrument provides to the contrary.

Comment. A commenter suggested that an exception to the definition of "education records" be added for non-academic records kept by seminaries. The commenter indicated that seminaries and schools or departments of divinity or theology which are part of a college or university may maintain records on candidates for the priesthood or ministry, rabbinite, or religious orders. These records contain information on the spiritual and psychological development of such persons, and pertain to their suitability for the ministry, rabbinate or religious order, rather than to their educational performance. The commenter argued that the requirements of the Act should not apply to such records. Additionally, the commenter stated that the regulations should "exclude the application of the law when grants to the university complex do not aid the seminary."

Response. As is made clear in the definitions of "education records," "student," and "educational agency or institution" contained in the Act, section 438 applies generally to all records directly relating to a student which are maintained by any part of an educational agency or institution which receives funds from programs for which the Commissioner has administrative responsibility. However, whether section 438 covers the type of record described by the commenter, or applies to the record-keeping policies of schools of divinity or theology which are part of an educational institution, may involve complex constitutional questions and interpretations of Supreme Court decisions. For this reason, such issues will be considered closely on a case-by-case basis as they arise, but will not at this time be addressed by regulation.

Comment. Several commenters asked if the definition of a student was intended to include or exclude certain individuals, such as former students.

Response. A new definition of student is provided which adopts much of the language used in section 438 (a) (6). The definition states "'Student' * * * includes any individual with respect to whom an educational agency or institution maintains education records."

Other Changes.. A definition has been added for "disclosure." The terms "access" and "release" previously used to distinguish between disclosure to a parent or student and disclosure to a third party, respectively, generated confusion easily avoided by the use of the new single term to cover both situations.

The definition of "office and review board" has been deleted because the functions are explained under Subpart E -- Enforcement.

The definition of "panel" has been modified in order to avoid any confusion between a panel and the review board. A panel is a subunit of the review board designated to conduct a hearing.

3. Section 99.4 *Student rights.*

Comment. Several commenters indicated they felt that parents had a right to receive information pertaining to their son or daughter, particularly grade reports, even if their son or daughter was eighteen years of age and attending an institution of postsecondary education, since in many cases the parents were paying for the postsecondary education of their son or daughter.

Response. Section 438(d) states that:

> "* * * whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the students shall thereafter *only* be required of and accorded to the student." (Emphasis added.)

Since this is a right provided by statute no change been made in the regulations. An institution of postsecondary education is permitted by section 438 of the Act and this part to disclose information pertaining to an eligible student to the parents of the eligible student with the prior written consent of the eligible student or without the prior written consent of the eligible student if that student is a dependent as defined under section 152 of the Internal Revenue Code of 1954.

Comment.. Three commenters suggested that there was an apparent conflict between sections 99.4 (a) and 99.30 (h) of the proposed rules (99.30 (h) has been renumbered section 99.31 (a) (8)) and asked for clarification.

Response. A new section 99.4 (b) has been added to provide clarification and section 99.4 (b) of the proposed rules has been redesignated section 99.4 (c). Section 99.31 (a) (8) permits, but does not require, an institution of postsecondary education to disclose information contained in the education records of an eligible student to the parents of the eligible student if that eligible student is a dependent as defined under section 152 of the Internal Revenue Code of 1954. Section 99.4 (b) states that the status of an eligible student as a dependent of his or her parents for purposes of section 99.31 (a) (8) does not otherwise affect his or her rights under section 438 of the Act and this part.

4. Section 99.5 *Formulation of institutional policy and procedures.*

Comment. Several commenters indicated they felt that the notice requirement under section 99.5 of the proposed rules was too burdensome. The commenters, in most cases, did not object to the requirement that notice be provided to parents of students or eligible students, but they did object to the effect of the inclusion of certain items in the notice under section 99.5 (b) on the size of the document.

Response. The amount of information required to be given to parents of students and eligible students for annual notification purposes under section 99.5 of the proposed rules has been reduced. A new section 99.6 *Annual notification of rights* has been added to the regulations.

Comment.. A commenter stated that a basic requirement of the regulations should be that each educational agency or institution adopt a policy which is consistent with the requirements of section 438 of the Act and this part. The commenter pointed out that sections 433 (a) (1) (A), (b) (1) and (b) (2) contain explicit references to an educational agency or institution being required to adopt policies, and that sections 433 (a) (2), (a) (5) (B), (b) (4) (A), and (e) contain implicit references to the need for an educational agency or institution to adopt policies.

Response. New section 99.5 *Formulation of Institutional policy and procedures* requires that each educational agency or institution formulate and adopt a policy consistent with the minimum requirements of section 438 of the Act and this part. The policy is to be in writing, and copies are to be made available upon request to parents of students or eligible students.

Comment. Several commenters indicated that the requirement under section 99.5 (c) of the proposed rules that an educational agency or institution provide the required notification in the language of the parents of a student or an eligible student was, in many cases, inappropriate. Institutions of postsecondary education pointed out that since proficiency in the English language is a condition for admission to post-secondary institutions in the United States the requirement to provide notification to an eligible student in his or her language made little or no sense.

Response. The requirement in section 99.5 (c) of the proposed rules has been modified. New section 99.6 (b) requires that each agency or institution of elementary and secondary education, when developing a policy of informing parents of students of their rights, provide for the need to effectively notify parents identified as having a primary or home language other than English. The requirement that an institution of postsecondary education provide notification in the language of the eligible student has been deleted from the regulations.

Comment. Several commenters indicated they felt that the requirements in section 99.5 (b) of the proposed rules were excessive. The commenters were particularly concerned about the requirement that an educational agency or institution publish the name of the official who has been designated as responsible for each type of education record. They pointed out that the name was likely to change because different individuals would be appointed over a period of time. The commenters also expressed concern about attempting to list the persons who would have access to education records. They stated that it would be difficult, in advance, to specify all of the individuals who might have a need for access to education records.

Response. The requirement in section 99.5 (b) of the proposed rules regarding the official who has been designated by the educational agency or institution as responsible for each type of record has been modified. New section 99.5 (a) (2) (iv) requires that the policy adopted by an educational agency or institution of informing parents of students or eligible students of the types of education records maintained by the agency or institution specify the title and address of the individual who has been designated as responsible for each type of record. The requirement to specify the name of the individual has been deleted from the regulations.

The requirement in section 99.5 (b) of the proposed rules regarding the listing of persons who have access to education records has been deleted from the regulations. New section 99.5 (a) (3) requires that the policy adopted by an educational agency or institution includes a specification of the criteria that the agency or institution will use for determining which parties are "school officials" and what is considered to be a "legitimate educational interest."

5. Section 99.6 *Annual notification of rights and policy.*

Comment. Several commenters asked for clarification regarding the means to be used by an educational agency or institution to provide the notification required by section 99.5 (a) of the proposed rules. The specific question most often asked was whether notification must be provided on an individual basis to parents of students or to eligible students, or whether the notification could be published in a student handbook, school catalog, or student newspaper, or posted on bulletin boards at the school. Two commenters indicated that it was unclear as to whether notification was to be provided to former students as well as to students currently in attendance at an educational agency or institution.

Response. New section 99.6 states that the annual notification of rights and policy shall be " * * * by such means as are reasonably likely to inform parents or eligible students. * * * " The determination as to the actual means to be used is to made by each educational agency or institution. Some agencies and institutions may decide to provide notification on an individual basis; others may decide to publish the notification in a student handbook, school catalog, or student newspaper, or to post it on bulletin boards at the school. It was felt that the regulations should specify the criteria to be used in selecting a means of notification, but not the actual means of notification since the means may vary from agency to agency and institution to institution. In addition, new section 99.6 states that the notification is to be provided to parents of students in attendance or to eligible students in attendance at an educational agency or institution, therefore, making it clear that the notification of rights and policy need not be provided to former students or their parents.

Comment. Several commenters indicated they felt that the requirement for an educational agency or institution to provide notification on an annual basis was excessive. One commenter suggested that notification should be provided on a one-time basis at the time that a student enrolled in the educational agency or institution.

Response. It was determined that the requirement for an educational agency or institution to provide notification on an annual basis was not excessive. Educational agencies and institutions generally issue or distribute student handbooks or school catalogs at the first of each school year. The notification could, in many instances, be a part of a handbook or catalog. Institutions of elementary and secondary education often send letters or distribute bulletins to parents of students at the start of each school year in order to inform them of the school's policies. The notification could, in these instances, be included in the letters or bulletins. It was felt that notification on a one-time basis at the time that a student enrolled in an educational agency or institution was not sufficient to inform parents of students or eligible students of their rights. No change has been made in the requirement.

Comment. Several commenters stated they felt that the requirement under section 99.5 (b) (1) of the proposed rules to provide notification to parents of students or to eligible students as to the types of education records maintained by the educational agency or institution was excessive in that it was not specifically required by section 438 of the Act.

Response. New section 99.6 (a) states that each educational agency shall provide notification to parents of students or eligible students which is reasonably likely to inform them of their rights under the Act and this part. As was previously stated in the comment section which followed section 99.5 of the proposed rules, it was determined that it was essential to require that each educational agency or institution identify the types of education records maintained by it, so that parents of students or eligible students would be able to decide which education records they wished to inspect and review. A similar, but less burdensome listing of the information required by section 99.5 (b) (1) of the proposed rules is required under new section 99.5 (a) (2) (iv) to be included in the policy and procedures of the educational agency or institution.

Comment. A commenter recommended that each educational agency or institution be required to inform parents of students or eligible students of the right to file a complaint with the Department of Health, Education, and Welfare concerning an alleged failure by the agency or institution to comply with section 438 of the Act and this part.

Response. The right to file a complaint with the Department of Health, Education, and Welfare concerning an alleged failure by an educational agency or institution to comply with section 438 of the Act is one of the rights which parents of students or eligible students must be informed of under section 438 (e).

6. Section 99.7 *Limitation on waivers*.

Comment. A commenter asked for clarification regarding whether or not an eligible student was permitted to waive the right to inspect and review information, other than confidential letters and statements of recommendation, contained in his or her education records.

Response. Section 438 (a) (1) (C) states "A student or person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B). * * *" The confidential recommendations described in section 438 (a) (1) (B) (iii) are of three types "* * * respecting admission to any educational agency or institution * * * respecting an application for employment, and * * * respecting the receipt of an honor or honorary recognition." *The Joint Statement in Explanation of Buckley/Pell Amendment (Congressional Record*, at S 21489, daily edition, December 13, 1974) states in part, "And students may waive their right of access to confidential recommendations in three areas -- admissions, job placement, and receipt of awards." The statutory language, in light of the joint statement, would not preclude an eligible student from waiving his or her right to inspect and review; however, an educational agency or institution may not require that any right accorded by the Act be waived.

Comment. Several commenters asked if there was any limit on the period of time which a waiver could be considered to be in effect, and if a waiver provided by an eligible student could be revoked by that student at a later time.

Response. Nothing in section 433 of the Act or this part sets any limit on the period of time that a waiver shall be considered to be in effect. An eligible student may waive his or her right to inspect and review a confidential letter or statement of recommendation provided by a specific individual, or confidential letters and statements of recommendation provided for a specific purpose. The waiver will be considered to be in effect as long as the letters or statements of recommendation are maintained in the education records of the student. If an eligible student waives his or her right to inspect and review a specific class of letters and statements of recommendation, such as recommendations respecting employment, and later decides to revoke that waiver the student would be able to inspect only those letters and statements of recommendation respecting employment which were placed in his or her education records after the date that the waiver was revoked.

Comment. A commenter asked what would happen if an eligible student had waived his or her right to inspect and review confidential letters and statements of recommendation provided for a specific purpose if these letters and statements were subsequently used for a different purpose.

Response. Section 438 (a) (1) (C) states that "* * * [a] waiver shall apply only if * * * such recommendations are used solely for the purpose for which they were specifically intended." If an eligible student has waived his or her right to inspect and review confidential letters and statements of recommendation provided for a specific purpose, and these letters and statements of recommendation are subsequently used for a different purpose, the waiver would be considered void, and the eligible student would have the right to inspect and review the letters and statements of recommendation.

Other Changes. Section 99.6 of the proposed rules has been renumbered section 99.7.

7. Section 99.8 *Fees*.

Comment. Several commenters asked if an educational agency or institution could charge a fee for copies of education records.

Response. New section 99.8 states that an educational agency or institution may charge a reasonable fee for copies of education records which are made for parents of students, students, or eligible students.

SUBPART B -- INSPECTION AND REVIEW OF EDUCATION RECORDS

8. Section 99.11 *Right to inspect and review education records*.

Comment. A commenter suggested that language be added to section 99.11 stating that when parents are separated or divorced and one parent has been given custody of their child by agreement or a court order that both natural parents will have the right to inspect and review the education records of their child.

Response. Nothing in section 438 of the Act and this part is intended to effect the status of an agreement or court order under applicable State law regarding the custody of a child, or the exercise of rights on behalf of a child by separated or divorced parents. Paragraph (c) has been added to clarify this position.

Comment. A commenter recommended that the regulations state that an official of an educational agency or institution has a right to be present whenever the parent of a student or an eligible student inspects and reviews the education records of the student.

Response The determination as to whether or not an official of the educational agency or institution will be present whenever the parent of a student or an eligible student inspects and reviews the education records of the student has been left up to each educational agency or institution. Nothing in section 438 of the Act or this part would preclude an educational agency or institution from adopting a policy which would require the presence of an official during the inspection and review of education records, if that policy would not operate to effectively prevent the exercise of rights by the parent or student.

Other Changes. New section 99.11 incorporates requirements from sections 99.13 and 99.15 of the proposed rules. The requirement that an educational agency or institution comply with a request to inspect and review education records within a reasonable period of time, but in no case more than forty-five days after the request has been made has been incorporated into section 99.11 (a). Section 99.13 (c) and (d) of the proposed rules have been incorporated as sections 99.11 (b) (1) and (2) of the regulations. This change was made in order to consolidate provisions pertaining to the right to inspect and review education records in one section.

9. Section 99.12 *Limitations on right to inspect and review education records.*

Comment. Several commenters objected to confidential letters and statements of recommendation which were placed in the education records of an eligible student before January 1, 1975 being exempted from inspection and review by the eligible student.

Response. Section 438 (a) (1) (E) states that:

> "The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education * * * confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975."

No change has been made in the regulations.

Comment. Several commenters objected to an eligible student being able to inspect and review letters and statements of recommendation which were placed in his or her education records after January 1, 1975. Two commenters felt that if letters and statements of recommendation were open to inspection and review by an eligible student it would be difficult for an individual who had been asked to write a recommendation to provide an honest assessment of the eligible student's abilities.

Response. Section 438 (a) (1) (A) states that the parent of a student or an eligible student has the right to inspect and review the education records of the student. Section 438 (a) (1) (C) permits an individual who is an applicant for admission to an agency or institution of postsecondary education or is a student in attendance at an agency or institution of postsecondary education to waive his or her right to inspect and review confidential recommendations respecting admission to an educational agency or institution, respecting an application for employment, and respecting the receipt of an honor or honorary recognition as long as certain conditions are met by the educational agency or institution including that:

> "Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution."

No change has been made in the regulations. But additional waiver provisions were added.

Comment. Several commenters asked for clarification regarding whether or not an applicant for admission to an educational agency or institution has a right to inspect and review education records.

Response. The right to inspect and review education records is provided to the parent of a student or an eligible student. An applicant for admission to an educational agency or institution who is unsuccessful in his or her application may not be considered a student for purposes of section 438 of the Act or this part. The definition of student" at section 438 (a) (6) states in part: " * * * student * * * does not include a person who has not been in attendance at such agency or institution."

10. Section 99.13 *Limitation on destruction of education records.*

Comment. A commenter stated that an educational agency or institution should be permitted to destroy education records after a specified period of time.

Response. Generally, educational agencies and institutions are not precluded from destroying records unless there is an outstanding request to inspect and review them. The length of time which education records are required to be maintained by an educational agency or institution is, in many cases, determined under applicable State law or agency or institutional regulations. No change has been made in the regulations.

Comment. A commenter recommended that each educational agency or institution be required to provide notification to parents and eligible students 60 days in advance of the destruction of any education records.

Response. Nothing in section 438 of the Act and this part would preclude an educational agency or institution adopting a policy of providing notification to parents of students, and eligible students prior to the destruction of any education records. Such a requirement might work an undue burden on educational agencies or institutions which, though having a policy of destroying certain materials, purge records on a day-to-day basis rather than on a fixed schedule. No change has been made in the regulations.

Other Changes. Section 99.14 of the proposed rules has been renumbered section 99.13. Section 99.15 of the proposed rules has been deleted because it was redundant. Sections 99.13 (c) and (d) were redesignated sections 99.11 (b) (1) and (b) (2). The other paragraphs in section 99.13 have been deleted because they were redundant.

SUBPART C -- AMENDMENT OF EDUCATIONAL RECORDS

11. Section 99.20 *Request to amend education records.*

Comment. Several commenters indicated they were concerned that an educational agency or institution might use the informal proceedings under section 99.21 of the proposed rules to delay in providing the parent of a student or an eligible student with an opportunity for a hearing to seek the correction of education records.

Response. Section 99.21 of the proposed rules has been deleted. New section 99.20 states that if a parent of a student or an eligible student believes that information in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student, the parent or the eligible student may request that the educational agency or institution amend the records. The educational agency or institution must decide whether to amend the education records within a reasonable period of time of receipt of the request. If the educational agency or institution decides to refuse to amend the education records of the student, the agency or institution must inform the parent of the student or the eligible student of the right to a hearing. If concerned that the educational agency or institution is utilizing informal attempts to reconcile differences as a delaying tactic, the parent or eligible student may exercise his right to a hearing without benefit of the decision from any informal proceeding.

12. Section 99.21 *Right to a hearing.*

Comment. A commenter suggested that the right to a hearing to seek the correction of information contained in the education records of a student be limited to permanent education records which are not more than three years old.

Response. The statute does not provide for such a time limitation. Section 438(a) (2) states that:

> "the parents of students who are or have been in attendance at a school of such agency or such institution are provided an opportunity for a hearing * * * to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students.* * *"

In addition, the fact that the right is provided to parents of students "who * * * have been in attendance * * *" as well as to parents of students "who * * * are in attendance. * * *" makes it clear that the right to a hearing may not be denied because the education records are more than three years old. The purpose of the hearing is "to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained. * * *" in the education records of a student regardless of when the information was entered in the education records. No change has been made in the regulations.

Comment. A commenter recommended it be made explicit that when an educational agency or institution finds that information contained in the education records of a student is inaccurate, misleading, or otherwise inappropriate that the information must be corrected or deleted from the education records.

Response. New section 99.21 (b) states that if, as a result of a hearing, an educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the rights of the student, the agency, or institution shall amend the education records of the student accordingly, and so inform the parent of the student or the eligible student in writing.

Comment. A commenter requested clarification regarding whether or not a hearing could be requested by a parent of a student or an eligible student to contest the assignment of a grade.

Response. A hearing may not be requested by a parent of a student or an eligible student to contest the assignment of a grade; however, a hearing may be requested to contest whether or not the assigned grade was recorded accurately in the education records of the student. The *Joint Statement in Explanation of Buckley/Pell Amendment (Congressional Record* at S. 21488, daily edition, December 13, 1974) stated in part:

> "There has been much concern that the right to a hearing will permit a parent or student to contest the grade given a student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to this law contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade."

Other Changes. Section 99.20 of the proposed rules has been renumbered section 99.21.

14. Section *99.22 Conduct of the hearing.*

Comment. Several commenters expressed concern that the standards for the conduct of a hearing did not adequately satisfy due process requirements. The commenters recommended the inclusion of additional requirements to protect parents and students such as: (1) specifying the period of time within which educational agencies or institutions must hold a hearing, (2) requiring that the hearing be held at a time and place convenient for the parent or student, (3) permitting the parent or student to be assisted by an attorney or other representative of his or her choice, (4) providing the parent or student with an opportunity to present evidence relevant to the issues, (5) requiring that the hearing be conducted by an official who is not an employee of the school, agency, or institution, (6) requiring that the hearing be conducted and the decision be provided in the primary language of the parent or student, and (7) requiring that the decision be based solely on evidence presented at the hearing.

Response. New section 99.22 includes many, but not all of the recommended requirements. In some instances the recommended requirements have been modified. Section 99.22 (a) states that the parent of a student or an eligible student shall be given notice of the date, place and time reasonably in advance of the hearing. An educational agency or institution must make a reasonable effort to schedule the hearing at a time and place which is convenient for the parent or eligible student and conduct the hearing in a manner that will not effectively prevent the exercise of the parents' or students' rights.

Section 99.22 (c) states that a parent of a student or an eligible student shall be afforded a full and fair opportunity to present evidence which is relevant to the issues, and that a parent or an eligible student may be assisted or represented by an individual of his or her choice at his or her own expense, including an attorney.

Section 99.22 (e) states that the decision of an educational agency or institution shall be based solely upon the evidence presented at the hearing. In addition, the decision must include a summary of the evidence and the reasons for the decision.

It was determined that it was not feasible to set a specific period of time within which each educational agency or institution must hold a hearing. It was felt that the requirement under section 99.22 (a) that a hearing be held within "* * * a reasonable period of time after the educational agency or institution has received the request * * *" when combined with the requirement under section 99.5 (a) (5) that each educational agency or institution specify, as part of the policy it is required to formulate and adopt, the reasonable time limits under which it shall be obligated to act under the requirements of section 99.22 (a) provides adequate protection to parents and students.

It was determined that the requirement that the hearing be conducted by an agency or institutional official or other party, who does not have a direct interest in the outcome of the hearing, provides adequate protection to parents and students. Nothing in section 438 of the Act or this part would preclude an educational agency or institution from employing a hearing examiner to conduct the hearing: however, the decision to abide with the determination of the hearing examiner must be the decision of the educational agency or institution.

It was determined that the requirement that an educational agency or institution conduct a hearing and provide the decision in the primary language of the parent or student would in many cases be burdensome. A parent or an eligible student has a right under section 99.22 (c) to "* * * be assisted or represented by individuals of his or her choice at his or her own expense.* * *" If a parent of a student does not speak English he or she could also be assisted by another individual who is qualified to serve as an interpreter. An educational agency or institution which serves students in an area where the primary home language of the parents and students is a language other than English, is encouraged, but not required, whenever possible to conduct the hearing and provide the decision in the primary or home language of the parents and students.

Other Changes. Section 99.22 of the proposed rules entitled *Formal proceedings* has been retitled *Conduct of the hearing.*

SUBPART D -- DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION FROM EDUCATIONAL RECORDS

15. Section 99.30 *When prior consent for disclosure required.*

Comment. Several commenters objected to the requirement that the names of the parties to whom information from the education records of a student is to be disclosed must be included as a part of the written consent.

Response. The requirement to include the names of the parties to whom information from the education records of a student is to be disclosed has been deleted. New section 99.30 (c) states that the written consent must indicate "* * * the party or class of parties to whom the disclosure may be made."

Comment. Two commenters objected to the requirement that the consent to disclose information from the education records of a student must be a written consent.

Response. This is a statutory requirement. Section 438 (b) (2) (A) specifies that information from the education records of a student may not be disclosed, except to particular parties or under particular circumstances, unless "* * * there is written consent from the student's parents. * * *" No change has been made in this requirement.

Comment. Several commenters indicated that it would be extremely difficult for an educational agency or institution to determine if a parent, particularly in the case of separated or divorced parents, has the authority to give consent for the disclosure of Information from the education records of his or her child.

Response. New section 99.30 (b) states that whenever written consent is required for the disclosure of information from the education records of a student, an educational agency or institution may presume that a parent of a student giving consent has the authority to do so, unless the agency or institution has been provided with evidence that the parent does not have the authority under applicable State law.

Comment. Several commenters indicated they felt that the requirement in section 99.33 (c) of the proposed rules, which provided that when an institution was a guardian for a student an independent party must be appointed to consent to the disclosure of information from the education records of a student was inappropriate.

Response. The requirement that an independent party be appointed to consent to the disclosure of information from the education records of a student has been deleted. If an institution has been appointed the guardian of a student under applicable State law, the institution may exercise the rights provided to the parent of a student, unless it is precluded from doing so by another Federal or State statute.

Other Changes. New section 99.30 *When prior consent for disclosure required* incorporates material which appeared in sections 99.31 *Content of Consent* and 99.33 *Authority of parent to give consent.*

16. Section 99.31 *When prior consent for disclosure not required.*

Comment. Several commenters indicated they felt that there were additional individuals, institutions, agencies, or organizations to whom information from the education records of a student should be disclosed without the need for obtaining the written consent of a parent of a student or an eligible student.

Response. Section 438 (b) (1) (A) through (I) specifies the individuals, institutions, agencies, or organizations to whom or circumstances under which information from the education records of a student may be disclosed without the written consent of a parent of a student or an eligible student. Since this is determined by statute no change has been made in the regulations.

Comment. Several commenters requested clarification regarding who would decide which school officials could obtain information from the education records of a student without the written consent of a parent of a student or an eligible student because the official had a "legitimate educational interest" in the receipt of the information.

Response. Section 438 (b) (1) (A) specifies that an educational agency or institution may disclose information from the education records of a student without the written consent of a parent of a student or an eligible student to " * * * other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests; * * *." Section 99.5 (a) (3) indicates that each educational agency or institution include as a part of the policies and procedures "* * * a specification of the criteria for determining which parties are 'school officials' and what the educational agency or institution considers to be a 'legitimate educational interest', * * *."

Comment. Two commenters asked for clarification regarding to whom and for what purposes a disclosure of information from the education records of a student could be made in connection with financial aid without the written consent of a parent of a student or an eligible student.

Response. New section 99.31 (a) (4) specifies that a disclosure of information from the education records of a student may be made without the written consent of a parent of a student or an eligible student if the disclosure is to a party which is the source of or administers the financial aid for which a student has applied, if the information is required to determine the eligibility of the student for the financial aid, or to enforce the terms of the financial aid award.

Comment. Several commenters asked for clarification regarding the exception which allows an institution of postsecondary education to disclose information from the education records of an eligible student to a parent if the eligible student is a dependent.

Response. Section 438 (b) (1) (H) permits, but does not require, an educational agency or institution to disclose information from the education records of an eligible student to a parent if the eligible student is a dependent as defined in the Internal Revenue Code of 1954. If an educational agency or institution decides to adopt a policy of disclosing information from the education records of a dependent eligible student, the agency or institution will need to establish a procedure for determining whether or not the eligible student is a dependent as defined by the Internal Revenue Code. Some educational agencies or institutions may decide to ask an eligible student at the time of registration whether or not he or she is a dependent of his or her parents; other educational agencies or institutions may decide to require that a parent submit an affidavit stating that the eligible student is a dependent for income tax purposes. Nothing in section 438 of the Act or this part requires that a particular procedure be adopted for the purpose of establishing dependency.

Comment. Several commenters indicated that in many instances it would be difficult for an educational agency or institution to notify a parent of a student or an eligible student, particularly the parent of a former student or a former eligible student, of the receipt of a judicial order or subpoena in advance of the compliance therewith. Two commenters suggested that the requirement be that an educational agency or institution make a reasonable effort to provide the notification in advance of complying with the judicial order or subpoena.

Response. New section 99.31 (a) (9) states that an educational agency or institution must make " * * *a reasonable effort to notify the parent of a student or the eligible student of the order or subpoena in advance of compliance therewith; * * *."

Comment. Several commenters asked for clarification as to whether an educational agency or institution was required to disclose information from the education records of a student in those cases where the information could be disclosed without the written consent of a parent of a student or an eligible student._.

Response. New section 99.31 (b) states that "This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section."

Other Changes. Section 99.31 *When prior consent for disclosure not required* incorporates material which appeared in Section 99.30 *Consent of the proposed rules.*

17. Section 99.32 *Record of disclosures required to be maintained.*

Comment. Several commenters objected to the requirement that an educational agency or institution maintain a record of parties who had requested, as well as those who had obtained, information from the education records of a student.

Response. Section 438 (b) (4) (A) requires that an educational agency or institution

> "maintain a record, kept with the education records of each student, which will indicate all individuals, * * * agencies, or organizations which have requested or obtained access to a student's education records * * *."

The statute requires that a record be maintained of those parties who have "requested" information as well as those to whom information has been disclosed. No change has been made in the regulations.

Comment. A commenter asked for clarification regarding whether a record must be maintained of a disclosure of information to a parent of a student or an eligible student of information contained in the education records of the student.

Response. New section 99.32 (a) (replacing proposed section 99.38) has been modified to make it clear that an educational agency or institution need not maintain a record of a disclosure of information to a parent of a student or an eligible student of information from the education records of the student.

Comment. Several commenters requested clarification as to whether or not an educational agency or institution is required to maintain a record of the disclosure of directory information.

Response. Section 99.32 (a) makes it clear that an educational agency or institution is not required to maintain a record of the disclosures of directory information. Section 99.37 sets forth the requirements to be adhered to in the disclosure of directory information.

Comment. Two commenters asked for clarification regarding how long the record of disclosures of information contained in the education records of a student must be retained by an educational agency or institution.

Response. The record of disclosures of information contained in the education records of a student is considered to be a part of the education records of a student; therefore, the record of disclosures must be retained as long as the education. records of a student to which they relate are maintained by an educational agency or institution.

Other Changes. Section 99.33 *Record of access* of the proposed rules has been renumbered and. retitled section 99.32 *Record of disclosures required to be maintained.*

18. Section 99.33 *Limitations on redisclosure.*

Comment. A commenter asked for clarification as to whether information contained in the education records of a student which is disclosed to a centralized personnel bureau could be referred to various offices which might wish to consider a student for employment.

Response. Section 99.33 (a) (proposed 99.39) makes it clear that when information contained in the education records of a student is disclosed to an institution, agency, or organization the information may be used by its officers, employees, and agents; but only for the purpose for which the disclosure was made.

Comment. A commenter asked for clarification regarding whether information disclosed from the education records of a student to a third party before the effective date of section 433 of the Act could be redisclosed without the written consent of a parent of a student or an eligible student.

Response. The statutory requirement that an educational agency or institution not release information to a third party except on the condition that the information not be redisclosed without the written consent of the parent or eligible student was not operative until the effective date of the Act. The condition cannot, therefore, be imposed with respect to information released prior to the effective date of the Act.

Comment. A commenter suggested that an educational agency or institution be required to obtain a written assurance from a third party that the party will not disclose any information from the education records of a student without the written consent of a parent of a student or an eligible student.

Response. Section 99.33 (b) which provides a procedure to meet the requirement of section 438 (b) (4) (B) requires that each educational agency or institution inform a third party to whom information from the education records of a student is disclosed that the third party may not disclose any information without the written consent of a parent of a student or an eligible student. However, nothing in section 438 of Act or this part would preclude an educational agency or institution from adopting a policy of requiring a written assurance from a third party before disclosing information from the education records of a student.

Other Changes. Section 99.39 *Transfer of information by third parties* in the proposed rules has been renumbered and retitled section 99.33 *Limitations on redisclosure.*

19. Section 99.34 *Conditions for disclosure to officials of other schools and school systems.*

Comment. Several commenters indicated that it would be extremely difficult for an educational agency or institution to notify a parent or a student or an eligible student of the transfer of the education records of a student to another agency or institution, because usually the educational agency or institution did not have a new address for the parent or eligible student.

Response. New Section 99.34 (a) requires that each educational agency or institution transferring the education records of a student make a reasonable effort to notify a parent of a student or and eligible student of the transfer of records. Under the revised regulation, this requirement is met if the agency or institution includes a notice in its policies and procedures developed under Section 99.5 that it forwards education records to a school, on request, in which the student seeks or intends to enroll. The requirement would also be met if a letter is sent to the last known address of the parent or eligible student. An educational agency or institution may transfer the records without waiting to receive an acknowledgment from the parent or eligible student that he or she has received the notification. The sending school is not required to further notify a parent or eligible student in those cases in which the transfer of the records is initiated by the parent or eligible student at the sending school.

20. Section 99.35 *Disclosure to certain Federal and State officials for Federal program purposes.*

Comment. A commenter asked for clarification regarding whether Federal officials, other than those Federal officials listed in Section 438 (b) (3), could obtain information from the education records of a student without the written consent of a parent of a student or an eligible student,

Response. Section 438 (b) (3) enumerates the purposes for which certain Federal and State officials who may obtain information from the education records of a student without the written consent of the parent of a student or an eligible student under Section 438 of the Act and this part. It does not represent an attempt at an exhaustive listing of all the specific authorized representatives of those officials who might have responsibility for performing the functions described in 438 (b) (3).

Other changes. Section 99.37 *Release to Federal and State officials* of the proposed rules has been renumbered and retitled Section 99.35 *Disclosure to certain Federal and State officials for Federal program purposes.*

21. Section 99.36 *Conditions for disclosure in health and safety emergencies.*

Comment. Two commenters recommended that the regulations specify that the written consent of a parent of a student or an eligible student is not required for the disclosure of information from the education records of a student in a health or safety emergency.

Response. Section 99.31 (a) (10) states that an educational agency or institution may disclose information from the education records of a student without the written consent of a parent of a student or an eligible student in a health or safety emergency, subject to the conditions set forth in section 99.36.

Comment. A commenter stated that the decision as to what constitutes a health or safety emergency should be left to the discretion of an official of an educational agency or institution.

Response. Section 99.36 (a) states that an educational agency or institution may disclose information from the education records of a student in a health or safety emergency, but does not specify what constitutes a health or safety emergency. Each educational agency or institution must decide if there is a health or safety emergency which requires the disclosure of information from the education records of a student without the written consent of a parent of a student or an eligible student. Section 99.36 (b) enumerates the criteria to be used by an educational agency or institution in making a decision as to whether or not to disclose the information without written consent.

Other Changes. Section 99.35 *Release of information for health or safety emergencies* of the proposed rules has been renumbered and retitled section 99.36 *Conditions for disclosure in health and safety emergencies.*

22. Section 99.37 *Conditions for disclosure of directory information.*

Comment. Three commenters requested clarification regarding what would satisfy the requirement that an educational agency or institution give public notice of the categories of information that it has designated as directory information. The commenter suggested that the regulations specify that in the case of an institution of postsecondary education a notice in the school catalog would satisfy the requirement.

Response. New section 99.37 (b) states that an educational agency or institution shall "give public notice." The actual means to be used is to be determined by each educational agency or institution. An institution of postsecondary education could, for instance, publish the required notice and/or an article explaining it in the student newspaper, and make copies of the notice available at various department and school administrative offices.

Comment. A commenter suggested that each educational agency or institution be required to provide notification on an annual basis to parents of students or eligible students sixty days before the beginning of the school year as to the categories of personally identifiable information which the educational agency or institution has designated as directory information. If a parent of a student or an eligible student wanted to prohibit the disclosure of any category of information, he or she would be required to inform the educational agency or institution before or by the start of the school year.

Response. It was felt that it would be extremely difficult for an educational agency or institution to provide notification to parents of students or eligible students 60 days before the start of the school year. Many educational agencies and institutions, particularly institutions of elementary and secondary education, employ a limited number of individuals during the school vacation months. In addition, many educational agencies and institutions do not have an accurate list of students who will be in attendance at the agency or institution until the opening day of school or classes.

Comment. Several commenters indicated they felt that there should be restrictions on the disclosure of directory information by an educational agency or institution.

Response. An educational agency or institution which has followed the procedures set forth under section 99.37 may disclose directory information to any member of the public. Nothing in section 438 of the Act or this part would preclude an educational agency or institution adopting a more restrictive policy regarding the disclosure of directory information.

SUBPART E -- ENFORCEMENT

23. *Assurances required -- general.*

Comment. Two commenters suggested that each educational agency or institution be required to submit copies of the policies and procedures it has adopted in order to comply with section 438 of the Act and this part either in place of or in addition to the required assurance.

Response. Submission of copies of policies and procedures adopted by educational agencies or institutions is not considered to be an effective means of monitoring compliance with section 438 of the Act and this part, since it is an institution's practice which is of primary importance. However, the policies and procedures formulated and adopted by an educational agency or institution will be subject to review by the office established under section 99.60 as a part of its investigative function.

Comment. A commenter recommended that the requirement that each educational agency or institution submit an assurance that it is in compliance and will continue to comply with section 438 of the Act and this part be deleted because it has no statutory basis.

Response. The requirement that each educational agency or institution submit an assurance that it is in compliance has been deleted, primarily, to avoid additional paperwork burdens on the educational community. The assurance requirement for subgrants and subcontracts has, likewise, been deleted.

24. *Assurances -- conflict with State or local law.*

Comment. Several commenters indicated they felt that the procedures for a waiver of the requirements of section 438 of the Act and this part set forth in sections 99.63 (b) and (c) of the proposed rules were either unnecessary or inappropriate.

Response. Sections 99.63 (b) and (c) of the proposed rules have been deleted. The section has been modified to provide that each educational agency or institution shall inform the office designated to administer the Act if a State or local law exists which conflicts with the requirements of section 438 of the Act and this part.

25. Section 99.62 *Reports and records.*

Comment. A commenter recommended that section 99.64 be revised to specify the types of records and reports which are to be maintained by each educational agency or institution.

Response. The intent of section 99.62 (proposed section 99.64) is to ensure that each educational agency or institution will provide records or reports which may be required by the office or review board to carry out their assigned functions. The nature of such reports and records must be determined on a case-by-case basis. No change has been made in the regulations.

26. Section 99.63 *Complaint procedures.*

Comment. Several commenters recommended that section 99.65 (b) of the proposed rules which established a 180-day limitation for the filing of complaints be deleted because it was inappropriate.

Response. Section 99.65 (b) has been deleted.

Comment. A commenter suggested that the complaint procedures specify the information which is to be contained in a complaint.

Response. It was felt that most complaints will contain the minimal information which is necessary to begin an investigation of a complaint of an alleged violation of section 433 of the Act or this part. It is the responsibility of the office, as a part of its investigative function, to obtain additional information from the concerned complainant and educational agency or institution. No change has been made in the regulations.

Effective date. These regulations shall be effective on June 17, 1976.

Dated: June 8, 1976.

DAVID MATHEWS,
Secretary of Health, Education, and Welfare.

Subpart A – General

Sec.
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99.4 Student rights.
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Subpart B – Inspection and Review of Education Records

99.11 Right to inspect and review education records.
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Subpart C – Amendment of Education Records

99.20 Request to amend education records.
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Subpart D – Disclosure of Personally Identifiable Information From Education Records

99.30 Prior consent for disclosure required.
99.31 Prior consent for disclosure not required.
99.32 Record of disclosures required to be maintained.
99.33 Limitations on redisclosure.
99.34 Conditions for disclosure to officials of other schools or school systems.
99.35 Disclosure to certain Federal and State officials.
99.36 Conditions for disclosure in health or safety emergencies.
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Subpart E – Enforcement

99.60 Office and review board.
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99.64 Termination of funding.
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99.66 Hearing before Panel or a Hearing Officer.
99.67 Initial decision; final decision.

Authority: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g) unless otherwise noted.

Subpart A – General

§ 99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]

(20 U.S.C. 1230, 1232g)

(b) This part does not apply to an educational agency or institution solely because students attending that nonmonetary agency or institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the agency or institution itself.

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(20 U.S.C. 1232g)

(d) Except as otherwise specifically provided, this part applies to education records of students who are or have been in attendance at the educational agency or institution which maintains the records.

(20 U.S.C. 1232g)

§ 99.2 Purpose.

The purpose of this part, is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(20 U.S.C. 1232g)

§ 99.3 Definitions.

As used in this Part:

"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247, as amended.

"Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program.

"Commissioner" means the U.S. Commissioner of Education.

(20 U.S.C. 1232g)

"Directory Information" includes the following information relating to a student: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

(20 U.S.C. 1232g (a) (5) (A))

"Disclosure" means permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

(20 U.S.C. 1232g (b) (1))

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in §99.1 (a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of those components separate from that agency or institution.

(20 U.S.C. 1232g (a) (3))

"Education records" (a) mean those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:

(i) Are in the sole possession of the maker thereof, and

(ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a "substitute" means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position.

(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition;

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided*, That education records maintained by the educational agency or institution are not disclosed to the personnel of the law enforcement unit.

(3) (i) Records relating to an individual who is employed by an educational agency or institution which:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee, and

(C) Are not available for use for any other purpose.

(ii) This paragraph does not apply to records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.

(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity.

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment; *Provided*, That the records can be per-sonally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activi-ties which are part of the program of instruction at the educational agency or institution.

(5) Records of an educational agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution. An example would be information collected by an educational agency or institution pertaining to the accomplishments of its alumni.

(20 U.S.C. 1232g (a) (4))

"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of postsecondary education.

(20 U.S.C. 1232g (d))

"Financial Aid," as used in § 99.31 (a) (4) means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution.

(20 U.S.C. 1232g (b) (1) (D))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law.

(20 U.S.C. 1232g (d))

"Panel" means the body which will adjudicate cases under procedures set forth in § 99.65-99.67.

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

"Party" means an individual, agency, institution or organization.

(20 U.S.C. 1232g (b) (4) (A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

(20 U.S.C. 1232g)

"Record" means any information or data recorded in any medium, including, but not limited to: handwriting, print tapes, film, microfilm, and microfiche.

(20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health, Education, and Welfare.

(20 U.S.C. 1232g)

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.

(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

(20 U.S.C. 1232g (a) (5))

§ 99.4 Student rights.

(a) For the purpose of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

(b) The status of an eligible student as a dependent of his or her parents for the purposes of § 99.31 (a) (8) does not otherwise affect the rights accorded to and the consent required of the eligible student by paragraph (a) of this section.

(20 U.S.C. 1232g (d))

(C) Section 438 of the Act and the regulations in this part shall not be construed to preclude educational agencies or institutions from according to students rights in addition to those accorded to parents of students.

§ 99.5 Formulation of institutional policy and procedures

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of --

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the student;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of education records, maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent of the student or the eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least: (i) A statement of whether the educational agency or institution will disclose personally identifiable information from

the education records of a student under § 99.31 (a) (1) and, if so, a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest", and (ii) a specification of the personally identifiable information to be designated as directory information under § 99.37;

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

(5) Providing a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of a student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

[20 U.S.C. 1232g (e) and (f)]

§ 99.6 Annual notification of rights.

(a) Each educational agency, or institution shall give parents of students in attendance or eligible students in attendance at the agency or institution annual notice by such means as are reasonably likely to inform them of the following:

(1) Their rights under section 438 of the Act, the regulations in this part, and the policy adopted under § 99.5; the notice shall also inform parents of students or eligible students of the locations where copies of the policy may be obtained; and

(2) The right to file complaints under § 99.63 concerning alleged failures by the educational agency or institution to comply with the requirements of section 433 of the Act and this part.

(b) Agencies and institutions of elementary and secondary education shall provide for the need to effectively notify parents of students identified as having a primary or home language other than English.

[20 U.S.C. 1232g (e)]

§ 99.7 Limitations on waivers.

(a) Subject to the limitations in this section and § 99.12, a parent of a student or a student may waive any of his or her rights under section 438 of the Act or this part. A waiver shall not be valid unless in writing and signed by the parent or student, as appropriate.

(b) An educational agency or institution may not require that a parent of a student or student waive his or her rights under section 433 of the Act or this part. This paragraph does not preclude an educational agency or institution from requesting such a waiver.

(C) An individual who is an applicant for admission to an institution of postsecondary education or is a student in attendance at an institution of postsecondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation described in § 99.12(a) (3) except that the waiver may apply to confidential letters and statements only if: (1) The applicant or student is, upon request, notified of the names of all individuals providing the letters or statements; (2) the letters or statements are used only for the purpose for which they were originally intended, and (3) such waiver is not required by the agency or institution as a condition of admission to or receipt of any other service or benefit from the agency or institution.

(d) All waivers under paragraph (c) of this section must be executed by the individual, regardless of age, rather than by the parent of the individual.

(e) A waiver under this section may be made with respect to specified classes of: (1) Education records, and (2) persons or institutions.

(f) (1) A waiver under this section may be revoked with respect to any actions occurring after the revocation.

(2) A revocation under this paragraph must be in writing.

(3) If a parent of a student executes a waiver under this section, that waiver may be revoked by the student at any time after he or she becomes an eligible student.

[20 U.S.C. 1232g(a) (1) (B) and (C)]

§ 99.8 Fees.

(a) An educational agency or institution may charge a fee for copies of education records which are made for the parents of students, students, and eligible students under section 433 of the Act and this Part: *Provided*, That the fee does not effectively prevent the parents and students from exercising their right to inspect and review those records.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

[20 U.S.C. 1232g (a) (1)]

Subpart B – Inspection and Review of Education Records

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the educational agency or institution to reasonable requests for explanations and interpretations of the records; and

(2) The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

(c) An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

(a) An institution of postsecondary education is not required by section 433 of the Act or this part to permit a student to inspect and review the following records:

(1) Financial records and statements of their parents or any information contained therein;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of a student prior to January 1, 1975; *Provided*, That:

(i) The letters and statements were solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality, and

(ii) The letters and statements are used only for the purpose for which they were specifically intended;

(3) Confidential letters of recommendation and confidential statements of recommendation which were placed in the education records of the student after January 1, 1975.:

(i) Respecting admission to an educational institution;

(ii) Respecting an application for employment, or

(iii) Respecting the receipt of an honor or honorary recognition; *Provided*, That the student has waived his or her right to inspect and review those letters and statements of recommendation under § 99.7 (c).

(20 U.S.C. 1232g (a) (1) (B))

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to that student.

(20 U.S.C. 1232g (a) (1) (A)

§ 99.13 Limitation on destruction of education records.

An educational agency or institution is not precluded by section 438 of the Act or this part from destroying education records, subject to the following exceptions:

(a) The agency or institution may not destroy any education records if there is an outstanding request to inspect and review them under § 99.11;

(b) Explanations placed in the education record under § 99.21 shall be maintained as provided in § 99.21 (d), and

(C) The record of access required under § 99.32 shall be maintained for as long as the education record to which it pertains is maintained.

(20 U.S.C. 1232g (f))

Subpart C – Amendment of Education Records

§ 99.20 Request to amend education records

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency or institution which maintains the records amend them.

(b) The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

[20 U.S.C. 1232g (a) (2)]

§ 99.21 Right to a hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students. The hearing shall be conducted in accordance with § 99.22.

(b) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall amend the education records of the student accordingly and so inform the parent of the student or the eligible student in writing.

(c) If, as a result of the hearing, the educational agency or institution decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall inform the parent or eligible student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution.

(d) Any explanation placed in the education records of the student under paragraph (c) of this section shall:

(1) Be maintained by the educational agency or institution as part of the education records of the student as long as the record or contested portion thereof is maintained by the agency or institution, and

(2) If the education records of the student or the contested portion thereof is disclosed by the educational agency or institution to any party, the explanation shall also be disclosed to that party.

[20 U.S.C. 1232g (a) (2)]

§ 99.22 Conduct of the hearing.

The hearing required to be held by § 99.21 (a) shall be conducted according to procedures which shall include at least the following elements:

(a) The hearing shall be held within a reasonable period of time after the educational agency or institution has received the request, and the parent of the student or the eligible student shall be given notice of the date, place and time reasonably in advance of the hearing;

(b) The hearing may be conducted by

any party, including an official of the educational agency or institution who does not have a direct interest in the outcome of the hearing.

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney.

(d) The educational agency or institution shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(e) The decision of the agency or institution shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decisions.

[20 U.S.C. 1232g (a) (2)]

Subpart D – Disclosure of Personally Identifiable Information From Education Records

§ 99.30 Prior consent for disclosure required.

(a) (1) An educational agency or institution shall obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in § 99.31.

(2) Consent is not required under this section where the disclosure is to (i) the parent of a student who is not an eligible student, or (ii) the student himself or herself.

(b) Whenever written consent is required, an educational agency or institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or purposes of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

(d) When a disclosure is made pursuant to paragraph (a) of this section, the educational agency or institution shall, upon request, provide a copy of the record which is disclosed to the parent of the student or the eligible student, and to the student who is not an eligible student if so requested by the student's parents.

[20 U.S.C. 1232g (b)(1) and (b) (2) (A)]

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student of the eligible student if the disclosure is --

(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in § 99.34;

(3) Subject to the conditions set forth in § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received: *Provided*, That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number and type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided*, That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in § 99.36.

(b) This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section.

[20 U.S.C. 1232g (b) (1)]

§ 99.32 Record of disclosures required to be maintained.

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interests these parties had in requesting or obtaining the information.

(b) Paragraph (a) of this section does not apply to disclosures to a parent of a student or an eligible student, disclosures pursuant to the written consent of a parent of a student or an eligible student when the consent is specific with respect to the party or parties to whom the disclosure is to be made, disclosures to school officials under § 99.31 (a) (1), or to disclosures of directory information under § 99.37.

(c) The record of disclosures may be inspected;

(1) By the parent of the student or the eligible student,

(2) By the school official and his or her assistants who are responsible for the custody of the records, and

(3) For the purpose of auditing the recordkeeping procedures of the educational agency or institution by the parties authorized in, and under the conditions set forth in § 99.31 (a) (1) and (3).

(20 U.S.C. 1232g(b) (4) (A))

§ 99.33 Limitation on redisclosure.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student, except that the personally identifiable information which is disclosed to an institution, agency or organization may be used by its officers, employees and agents, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not preclude an agency or institution from disclosing personally identifiable information under § 99.31 with the understanding that the information will be redisclosed to other parties under that section; *Provided*, That the recordkeeping requirements of § 99.32 are met with respect to each of those parties.

(c) An educational agency or institution shall, except for the disclosure of directory information under § 99.37, inform the party to whom a disclosure is made of the requirement set forth in paragraph (a) of this section.

[20 U.S.C. 1232g (b) (4) (B)]

§ 99.34 Conditions for disclosure to officials of other schools and school systems.

(a) An educational agency or institution transferring the education records of a student pursuant to § 99.31 (a) (2) shall:

(1) Make a reasonable attempt to notify the parent of the student or the eligible student of the transfer of the records at the last known address of the parent or eligible student, except:

(i) When the transfer of the records is initiated by the parent or eligible student at the sending agency or institution, or

(ii) When the agency or institution includes a notice in its policies and procedures formulated under § 99.5 that it forwards education records on request to a school in which a student seeks or intends to enroll; the agency or institution does not have to provide any further notice of the transfer;

(2) Provide the parent of the student or the eligible student, upon request, with a copy of the education records which have been transferred; and

(3) Provide the parent of the student or the eligible student, upon request, with an opportunity for a hearing under Subpart C of this part.

(b) If a student is enrolled in more than one school, or receives services from more than one school, the schools may disclose information from the education records of the student to each other without obtaining the written consent of the parent of the student or the eligible student; *Provided*, That the disclosure meets the requirements of paragraph (a) of this section.

[20 U.S.C. 1232g (b) (1) (B)]

§ 99.35 Disclosure to certain Federal and State officials for Federal program purposes.

(a) Nothing in section 438 of the Act or this part shall preclude authorized representatives of officials listed in § 99.31 (a) (3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

(b) Except when the consent of the parent of a student or an eligible student has been obtained under § 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in § 99.31 (a) (3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements.

[20 U.S.C. 1232g (b) (3)]

§ 99.36 Conditions for disclosure in health and safety emergencies.

(a) An education agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) The factors to be taken into account in determining whether personally identifiable information from the education records of a student may be disclosed under this section shall include the following:

(1) The seriousness of the threat to the health or safety of the student or other individuals;

(2) The need for the information to meet the emergency;

(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section shall be strictly construed.

[20 U.S.C. 1232g (b) (1) (I)]

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information.;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

[20 U.S.C. 1232g (a) (5) (A) and (B)]

Subpart E – Enforcement

§ 99.60 Office and review board.

(a) The secretary is required to establish or designate an office and a review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and the regulations in this part. The review board will adjudicate cases referred to it by the office under the procedures set forth in § § 99.65-99.67.

(b) The following is the address of the office which has been designated under paragraph (a) of this section: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health, Education, and Welfare, 330 Independence Ave. SW., Washington, D.C. 20201.

(20 U.S.C. 1232g (g))

§ 99.61 Conflict with State or local law.

An educational agency or institution which determines that it cannot comply with the requirements of section 438 of the Act or of this part because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part shall so advise the office designated under § 99.60 (b) within 45 days of any such determination, giving the text and legal citation of the conflicting law.

(20 U.S.C. 1232g(f))

§ 99.62 Reports and records.

Each educational agency or institution shall (a) submit reports in the form and containing such information as the Office of the Review Board may require to carry out their functions under this part and (b) keep the records and afford access thereto as the Office or the Review Board may find necessary to assure the correctness of those reports and compliance with the provisions of sections 438 of the Act and this part.

(20 U.S.C. 1232g(f) and (g))

§ 99.63 Complaint procedure.

(a) Complaints regarding violations of rights accorded parents and eligible students by section 438 of the Act or the regulations in this part shall be submitted to the Office in writing.

(b) (1) The Office will notify each complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the agency or institution under paragraph (b) (1) of this Section shall include the substance of the alleged violation and the agency or institution shall be given an opportunity to submit a written response.

(c) (1) The office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation the Office will provide written notification of its findings and the basis for such findings, to the complainant and the agency or institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (c) (2) of this section, the specific steps which must be taken by the agency or educational institution to bring the agency or institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the agency or institution to voluntarily comply.

(d) If the educational agency or institution does not come into compliance within the period of time set under paragraph (c) (3) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.64-99.67, inclusive.

(20 U.S.C. 1232g (f))

§ 99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational agency or institution has failed to comply with the provisions of section 438 of the Act, or the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1 (a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected by the failure to comply) until there is no longer any such failure to comply.

(20 U.S.C. 1232g (f))

§ 99.65 Hearing procedures.

(a) *Panels*. The Chairman of the Review Board shall designate Hearing Panels to conduct one or more hearings under § 99.64. Each Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) *Procedural rules*. (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be, materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1) (ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(20 U.S.C. 1232g (g))

§ 99.66 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.65 (b) (2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 1232g (g))

§ 99.67 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording the party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review the decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany that action with a written statement of the grounds for the modification or reversal, which shall promptly be, filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon the decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational agency or institution involved or its attorney.

(20 U.S.C. 1232g(g))

[FR doc.76-17309 filed 6-16-76; 8:45 am]

DEPARTMENT OF EDUCATION

34 CFR Part 99

Family Educational Rights and Privacy.

AGENCY: Department of Education.
ACTION: Final regulations.

SUMMARY: The Secretary revises and renames the Department of Education regulations formerly titled the Privacy Rights of Parents and Students. These regulations are retitled Family Educational Rights and Privacy and eliminate some of the regulatory requirements placed on educational agencies and institutions. The regulations have also been rewritten for clarity.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT:
Ellen Campbell or Connie Moore, Family Policy and Regulations Office, Office of Management, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 3021, Federal Office Building No. 6), Washington, DC 20202. Telephone: (202) 732-2057.

SUPPLEMENTARY INFORMATION: Under Executive Order 12291, the Department of Education regularly reviews its regulations to determine whether the Department can decrease burdens on the public and otherwise simplify and clarify existing regulations. As part of this process, the Department has reviewed the regulations implementing the Family Educational Rights and Privacy Act (FERPA).

The FERPA regulations of the former Department of Health, Education, and Welfare (HEW) (45 CFR Part 99) were transferred to the Department of Education (ED) and recodified in Part 99 of Title 34 of the Code of Federal Regulations on May 9, 1980 (45 FR 30802). These regulations implement FERPA, which was enacted as section 438 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232g).

The FERPA sets out requirements designed to afford parents and students privacy and other rights with respect to education records. The statute applies to educational agencies and institutions that receive funds under an applicable program administered by ED. For purposes of FERPA, an applicable program is a program that was either formerly administered by the Commissioner of Education prior to the establishment of ED on May 4, 1980 or any program that came into existence after ED was established unless the law creating the new program has the effect of making FERPA inapplicable. Educational agencies and institutions to which FERPA applies must maintain education records consistent with the requirements of FERPA. In brief, FERPA requires those agencies or institutions to provide parents and eligible students access to records directly related to the students; to permit parents and eligible students to challenge those records on the grounds that they are inaccurate, misleading, or otherwise in violation of the student's privacy or other rights; to obtain the written consent of parents and eligible students before releasing personally identifiable information about the students contained in education records to other than organizations or individuals described in statutory exceptions; and to notify parents and eligible students of these rights.

On June 10, 1987, the Secretary published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (52 FR 22250). The NPRM included a discussion of the numerous revisions and invited public comment. The revisions are intended to simplify and clarify the regulations and not to alter any interpretation under existing regulations.

In response to the Secretary's invitation in the NPRM, educational associations, organizations, universities, and individuals submitted 20 letters, which contained a total of 113 comments. More than half of the letters were from institutions of higher education and were transmitted through an organization representing the higher education community. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix to these final regulations.

Executive Order 12606

The Secretary has reviewed these regulations in accordance with Executive Order 12606, "The Family." The regulations were assessed in light of the criteria set forth in the Executive Order to determine whether they have any potential negative impact on the family. They were found to have no negative impact. In fact, the regulations will strengthen the autonomy, stability, and rights of the family unit.

The criterion of the Order which is most applicable to these regulations asks: "Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?" The statute and the implementing regulations strengthen the rights of parents by reaffirming their basic right to have access to the education records of their children, their right to be assured of the privacy of their children's records, and their right to challenge records believed to be inaccurate, misleading, or otherwise in violation of the student's privacy.

Another criterion which is applicable to these regulations asks: "Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?" Overall, these regulations are found to strengthen the stability of the family. In particular, the FERPA provisions which afford parents the right to have access to and some control over the education records of their children serve to encourage parents to be involved in the education of their children. Furthermore, by affording both parents (whether custodial or non-custodial) the right to have access to the records, the regulations serve to encourage joint parental involvement in their children's education.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education department, Family educational rights, Privacy, Parents, Reporting and recordkeeping requirements, Students.

(Catalog of Federal Domestic Assistance number does not apply.)

Dated February 19, 1988

William J. Bennett
Secretary of Education

The Secretary revises Part 99 of Title 34 of the Code of Federal Regulations to read as follows:

PART 99 –FAMILY EDUCATIONAL RIGHTS AND PRIVACY

Subpart A – General

Sec.
99.1 To which educational agencies or institutions do these regulations apply?
99.2 What is the purpose of these regulations?
99.3 What definitions apply to these regulations?
94.4 What are the rights of parents?
94.5 What are the rights of eligible students?
99.6 What information must an educational agency or institution's policy contain?
99.7 What must an educational agency or institution include in its annual notification?

Subpart B – What are the Rights of Inspection and Review of Education Records?

99.10 What rights exist for a parent or eligible student to inspect and review education records?
99.11 May an educational agency or institution charge a fee for copies of education records?
99.12 What limitations exist on the right to inspect and review records?

Subpart C – What are the Procedures for Amending Education Records?

99.20 How can a parent or eligible student request amendment of the student's education records?
99.21 Under what conditions does a parent or eligible student have the right to a hearing?
99.22 What minimum requirements exist for the conduct of a hearing?

Subpart D – May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?
99.31 Under what conditions is prior consent not required to disclose information?
99.32 What recordkeeping requirements exist concerning requests and disclosures?
99.33 What limitations apply to the redisclosure of information?
99.34 What conditions apply to disclosure of information to other educational institutions?
99.35 What conditions apply to disclosure of information for Federal or State program purposes?
99.36 What conditions apply to disclosure of information in health and safety emergencies?
99.37 What conditions apply to disclosing directory information?

Subpart E – What are the Enforcement Procedures?

99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?
99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?
99.62 What information must an educational agency or institution submit to the Office?
99.63 Where are complaints filed?
99.64 What is the complaint procedure?
99.65 What is the content of the notice of complaint issued by the Office?
99.66 What are the responsibilities of the Office in the enforcement process?
99.67 How does the Secretary enforce decisions?

Authority: Sec. 438, Pub.L. 90-247, Title IV as amended, 88 Stat. 571-574 (20 U.S.C. 1232g), unless otherwise noted.

Subpart A – General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) This part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary of Education that --

(1)(i) Was transferred to the Department under the Department of Education Organization Act (DEOA); and

(ii) Was administered by the Commissioner of Education on the day before the effective date of the DEOA; or

(2) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.

(Authority: 20 U.S.C. 1230, 1232g, 3487, 3507)

(b) The following chart lists the funded programs to which Part 99 does not apply as of April 11, 1988:

Name of Program	Authorizing Statute	Implementing Regulations
1. High School Equivalency Program and College Assistance Migrant Program	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L 96-374) 20 U.S.C. 1070d-2)	Part 206
2. Programs administered by the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research.	The Rehabilitation Act of 1973, as amended (29 U.S.C. 700 *et. seq*)	Parts 350-359, 361, 365, 366, 369-371, 373-375, 378, 379, 385-390, and 395
3. Transition program for refugee children	Immigration and Nationality Act, as amended By The Refugee Act of 1980. Pub. L 96-212 (8 U.S.C. 1522(d)).	Part 538
4. College Housing	Title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749, *et. seq.*)	Part 614
5. The following programs administered by the Assistant Secretary for Educational Research and Improvement: Educational Research Grant Program, Regional Educational Laboratories Research and Development Centers. All other research or statistical activities funded under Section 405 or 406 of the General Education Provisions Act.	Section 405 of the General Education Provisions Act (20 U.S.C. 1221e), and section 406 of the General Education Provisions Act (20 U.S.C. 1221-1)	Parts 700, 706-708

Note: The Secretary, as appropriate, updates the information in this chart and informs the public.

(c) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(d) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section --

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(e) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

(Note: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.)

§ 99.3 What definitions apply to those regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 438 of the General Education Provisions Act.

(Authority; 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to --

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

"Directory information" means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b) (1))

"Educational agency or institution" means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

"Education records" (a) The term means those records that are --

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include --

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are --

(i) Maintained separately from education records;

(ii) Maintained solely for law enforcement purposes; and

(iii) Disclosed only to law enforcement officials of the same jurisdiction;

(3)(i) Records relating to an individual who is employed by an educational agency or institution that --

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are --

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232 g(d))

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable information" includes, but is not limited to --

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

"Record" means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

"Student," except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of eligible students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

(Authority: 20 U.S.C. 1232g(d))

§99.6 What information must an educational agency's or institution's policy contain?

(a) Each educational agency or institution shall adopt a policy regarding how the agency or institution meets the requirements of the Act and of this part. The policy must include --

(1) How the agency or institution informs parents and students of their rights, in accord with § 99.7;

(2) How a parent or eligible student may inspect and review education records under § 99.10, including at least --

(i) The procedure the parent or eligible student must follow to inspect and review the records;

(ii) With an understanding that it may not deny access to education records, a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of those records;

(iii) A schedule of fees (if any) to be charged for copies; and

(iv) A list of the types and locations of education records maintained by the agency or institution, and the titles and addresses of the officials responsible for the records;

(3) A statement that personally identifiable information will not be released from an education record without the prior written consent of the parent or eligible student, except under one or more of the conditions described in § 99.31;

(4) A statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information under § 99.1(a)(1) and , if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest;

(5) A statement that a record of disclosures will be maintained as required by § 99.32, and that a parent or eligible student may inspect and review that record;

(6) A specification of the types of personally identifiable information the agency or institution has designated its directory information under § 99.37; and

(7) A statement that the agency or institution permits a parent or eligible student to request correction of the student's education records under § 99.20, to obtain a hearing under § 99.21(a), and to add a statement to the record under § 99.21(b)(2).

(b) The educational agency or institution shall state the policy in writing and make a copy of it available on request to a parent or eligible student.

(Authority: 20 U.S.C. 1232g(e) and (f))
(Approved by the Office of Management and Budget under control number 1880-0508)

§ 99.7 What must an educational agency or institution include in its manual notification?

(a) Each educational agency or institution shall annually notify parents of students currently in attendance, and eligible students currently in attendance, at the agency or institution of their rights under the Act and this part. The notice must include a statement that the parent or eligible student has a right to -

(1) Inspect and review the student's education records;

(2) Request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;

(3) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and the regulations in this part authorize disclosure without consent.

(4) File with the U.S. Department of Education a complaint under §99.64 concerning alleged failures by the agency or institution to comply with the requirements of the act and this part; and

(5) Obtain a copy of the policy adopted under § 99.6.

(b) The notice provided under paragraph (a) of this section must also indicate the places where copies of the policies adopted under § 99.6 are located.

(c) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents and eligible students of their rights.

(d) An agency or institution of elementary or secondary education shall effectively notify parents of students who have a primary or home language other than English.

(Authority: 20 U.S.C. 1232g(e))
(Approved by the Office of Management and Budget under control number 1880-0508)

Subpart B – What are the Rights of Inspection and Review of Education Records?

§99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student.

(b) The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request.

(c) The educational agency or institution shall respond to reasonable requests for explanations and interpretations of the records.

(d) The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records.

(e) The educational agency or institution shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect, review, or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are --

(1) Financial records, including any information those records contain of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if --

(i) The student has waived his or her right to inspect and review those letters and statements; and,

(ii) Those letters and statements are related to the student's --

(A)Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if --

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall --

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(iii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

Subpart C-What are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights, he or she may ask the educational agency or institution to amend the record.

(b) The education agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy or other rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall --

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall --

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D --May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?

(a) Except as provided in § 99.31, an educational agency or institution shall obtain a signed and dated written consent of a parent or an eligible student before it discloses personally identifiable information from the student's education records.

(b) The written consent must --

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section --

(1) If a parent or eligible student so requests, the Educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provided the student with a copy of the records disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

§ 94.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is subject to the requirements of § 99.34, to officials of another school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is subject to the requirements of § 99.35 to authorize representatives of --

(i) The Comptroller General of the United States;

(ii) The Secretary; or

(iii) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to --

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities, if a State statute adopted before November 19, 1974 specifically requires disclosures to those officials and authorities.

(ii) paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type or State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to --

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if --

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(10) The disclosure is in connection with a health or safety,emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information," under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(b) This section does not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student to any parties under paragraphs (a) (1) through (11) of this section.

(Authority: 20 U.S.C. 1232g (a)(5)(A), (b)(1) and (b)(2)(B))

§ 99.32 What recordkeeping requirements exist concerning requests and

disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include --

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include --

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to --

(1) The parent or eligible student;

(2) A school official under § 99.31 (a)(1);

(3) A party with written consent from the parent or eligible student; or

(4) A party seeking directory information.

(Authority: 20 U.S.C. 1232g(b)(4)(A))
(Approved by the Office of Management and Budget under control number 1880-0508)

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if --

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures of directory information under § 99.31(a) (11) or to disclosures to a parent or student under § 99.31 (a) (12).

(d) Except for disclosures under § 99.31(a) (11) and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall --

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless --

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The policy of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if --

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must --

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if --

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Paragraph (a) of this section shall be strictly construed.

(Authority: 20 U.S.C. 1232g(b)(1)(I))

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of --

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

Subpart E -- What are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?

(a) For the purposes of this subpart, "Office" means the Family Policy and Regulations Office, U.S. Department of Education.

(b) The Secretary designates the Office to --

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Education Appeal Board to act as the Review Board required under the Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g (f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

§ 99.63 Where are complaints filed?

A person may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy and Regulations Office, U.S. Department of Education, Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(Authority: 20 U.S.C. 1232g(f))

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) If the Office receives a complaint, it notifies the complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(b) The notice to the agency or institution under paragraph (a) of this section --

(1) Includes the substance of the alleged violation; and

(2) Informs the agency or institution that the Office will investigate the complaint and that the educational agency or institution may submit a written response to the complaint.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section --

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take an action authorized under 34 CFR Part 78, including --

(1) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(2) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b) or 298.45(b), depending upon the applicable program under which the notice is issued; or

(3) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(**Note:** 34 CFR Part 78 contains the regulations of the Education Appeal Board.)

(Authority: 20 U.S.C. 1232g(g))

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix – Analysis of Comments and Changes

The following is an analysis of comments and changes in the regulations since publication of the NPRM. Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes are not addressed.

Two issues were raised that cannot be addressed under any specific section of the regulations. In one case commenters raised the issue in the context of different sections of the regulations; in the other case the issues concerned a section that was removed from the regulations. The following is a discussion of those two issues:

- Release of records from another agency or institution.

Comment: Several commenters believed an agency or institution should not be required to provide a student a copy of a transcript or other records from another agency or institution unless the originating agency or institution is no longer in existence. Other commenters believed language should be included that would permit an educational agency or institution to decline a request for disclosure of a student's transcript or other records from another agency or institution, unless the originating agency or institution is no longer in existence.

Discussion: The records in question fall within the definition of education records in that they are directly related to a student and are maintained by an educational agency or institution. An agency or institution is required to provide a parent or an eligible student access to all records, including those transcripts and records it did not originate but that it maintains. This requirement is set forth in the section entitled, "What rights exist for a parent or eligible student to inspect and review education records?" The FERPA does not forbid or require an agency or institution to disclose records to a third party, nor would it prevent an agency or institution from establishing a policy of not disclosing to third parties records that had originated at another agency or institution.

Change: None.

- Waiver of Rights.

Comment: One commenter expressed concern about the removal of the section which set forth the conditions under which a parent or a student could waive any or all of his or her rights under the Act. While not endorsing nonstatutory waivers, the commenter believed that if nonstatutory waivers will continue to be recognized, the conditions governing those waivers are necessary in order to protect against any possible abuse. A second commenter supported the deletion of the general waiver provision, stating that there is no authority for waivers beyond the very narrow ones set forth in the statute.

Discussion: There was no statutory requirement for the waiver provision that was included in the regulations or the conditions under which nonstatutory waivers could be permitted. Therefore, the section was removed. However, in removing it, the Secretary does not intend to preclude educational agencies and institutions from establishing policies and conditions under which parents or students would be allowed to execute nonstatutory waivers.

Change: None.

The Secretary's discussion of the other comments received on the NPRM follows:

Section 99.1 To which educational agencies or institutions do these regulations apply?

Comment: One commenter questioned the specific legislative authority exempting programs from this part and the effect of exempting the programs.

Discussion: The statute appears in Part C of the General Education Provisions Act (GEPA). Prior to the establishment of the Department, Part C applied only to programs administered by the Commissioner of Education. The Commissioner had no authority over programs administered by the Assistant Secretary of Education and the Director of the National Institute of Education. For programs that were transferred to the Department under the Department of Education Organization Act (DEOA), the provisions of Part C continued to apply only to those programs administered by the Commissioner on the day preceding the effective date of the DEOA. Thus, FERPA does not apply to former National Institute of Education programs and the former National Center for Educational Statistics, Rehabilitation Services, National Institute of Disability and Rehabilitation Research, College Housing, and the Transition Program for Refugee Children.

Change: None.

Section 99.3 What definitions apply to these regulations?

Definition of "Directory Information."

Comment: Several commenters objected to the standard proposed in the definition of "directory information," stating there is no authority to broaden the term to include other information beyond that identified by Congress. Others stated that what may be considered an invasion of privacy by one person may not be so considered by another, which could result in inconsistency.

In contrast, an equal number of commenters stated that the standard is "most helpful," a "notable improvement" and "should be incorporated in the regulations." One commenter asked that distinguished academic performance or public service be included.

One commenter asked how the standard was developed. Others seemed to believe the standard would replace the items that have been designated by statute.

Discussion: The statute states that "directory information" relating to a student includes the following: * * * and then lists items which may be considered directory information. The Department had interpreted the word "includes" to mean the list was not prescriptive. To clarify that interpretation, the phrase " * * * and other similar information" was added to the definition in the regulations published in 1976.

The Secretary, in revising the regulations, decided it would be preferable to establish a standard for interpreting the scope of the legislation. The standard, together with the list of items, should provide sufficient guidance for educational agencies and institutions. The standard would permit an agency or institution to mention distinguished academic performance or public service as long its it had designated that information as directory information and the parent or student had not objected to such a disclosure.

Change: None.

Section 99.3 Definition of "Education Records."

Comment: A commenter believed the regulations are unclear on whether the definition of education records includes or excludes records relating to an individual in attendance at an educational agency or institution who is also employed as a result of his or her status as a "student."

Discussion: All records relating to a student who is also an employee of an educational agency or institution are included in the definition of education records if the student's employment is contingent on the fact that he or she is a student. For example, all records, including employment records, of a student enrolled in a work-study program are education records; likewise, all records of a student who, because he or she is a student, is employed by the educational agency or institution to serve as a teaching assistant, lecturer, or in some other capacity, are education records. Excluded from the definition of education records are the employment records of an employee -- including, for example, a teaching assistant or lecturer -- whose employment did not result from and does not depend on the fact that he or she may also be a student at the agency or institution, provided that these employment records are made and maintained in the normal course of business, relate exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose.

Change: The definition has been rewritten for clarity.

Comment: One commenter believed that personally identifiable information relating to events or matters that transpire after the student is no longer in attendance should be covered by the definition of education records. The commenter was concerned that the exclusion of this information from the definition is without statutory authority, that it would allow an educational agency or institution to collect negative allegations or information on a former student, and that the parent or student would have no protection against release of the information to third parties.

Discussion: The exclusion is intended to allow educational agencies and institutions and their alumni organizations to perform their traditional functions of fund-raising and publishing information concerning the accomplishments of alumni. Most, if not all, alumni organizations perform these functions in contact with the former students. Since the collection and use of negative information about alumni is not an accepted or usual practice of educational agencies or institutions, the Secretary has decided that any expectation of abuse is minimal and would be insufficient to justify imposing an additional regulatory burden.

Change: None.

Section 99.3 Definition of "Parent."

Comment: One commenter believed the definition of "parent" should specifically state that a school district must provide rights to both natural parents, custodial and noncustodial. Another commenter believed that the new section "What are the rights of parents?" should specifically state that "noncustodial" parents are included in the Act's coverage. The commenters believed the proposed additions would further clarify the rights of noncustodial parents.

Discussion: In revising the regulations, the Secretary recognized the need to clarify the rights of custodial and noncustodial parents. Therefore, the new section was added to state specifically that the agency or institution shall give full rights under the law to either parent unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody, that specifically revokes these rights. The Secretary believes this new section provides sufficient clarification and that the definition of "parent" should remain as it appeared in the proposed regulations.

Change: None.

Section 99.3 Definition of "Student."

Comment: One commenter stated that the inclusion of "former student" in the definition of "student" improves the definition. Two other commenters appeared to believe that the purpose of the revision was to extend the law's coverage to include former students.

Discussion: Former students are covered under the statute's definition of student and have been entitled to the same rights as students in attendance since the law's passage. The intent of the revision is to make this clear in the definition section of the regulations. Those specific provisions of the regulations where rights are limited to current students are clearly stated in the revised regulations. See § 99.7 regarding annual notification, § 99.34 regarding disclosure to other educational agencies and institutions and § 99.37 regarding directory information.

Change: None.

Section 99.5 What are the rights of eligible students?

Comment: Two commenters believed the paragraph that was removed from this section, which is entitled "Student Rights" in the current regulations, should be reinserted. The paragraph stated that the rights of an eligible student are not affected by a provision in the regulations that allows an agency or institution to disclose information to the parents of such a student without the student's written consent. One of these commenters believed the reference should be reinserted in order to make clear the fact that the student's right to have access to his or her education records is not affected by the student's status as a dependent. The other commenter believed the removal of the reference may result in increased pressure on institutions to grant a parent's request for access without formally establishing that the student is in fact a dependent as defined in section 152 of the Internal Revenue Code.

Discussion: This section of the regulations clearly states that when a student becomes an eligible student, all of the FERPA rights transfer from the parents to the student. The section of the regulations entitled "Under what conditions is prior consent not required to disclose information?" provides that an agency or institution may disclose information to the parents of a dependent student without the student's consent; the provision does not require the school to do so. The paragraph that is being removed was not intended to have any effect on an agency's or institution's decision on whether to grant the parent's request for information. Nor was it intended to affect an agency's or institution's policies in establishing that a student is a dependent as defined in section 152 of the Internal Revenue Code.

Change: None.

Comment: Three commenters believed educational agencies and institutions should be required to allow the parents of dependent students to inspect and review the education records of the student. Another commenter believed that even allowing educational agencies and institutions to afford the parents the opportunity to have access undermined the intent of the law by removing the student's right to have control over the disclosure. This commenter believed that specific procedures for release of information to parents in specific circumstances were needed.

Discussion: The statute clearly provides that the parents' rights afforded by the law transfer to the student when the student reaches age 18 or is attending an institution of postsecondary education. The statute also clearly provides that an educational agency may disclose the education records of a dependent student to the parents of the student without the student's consent. The Secretary has no authority to change these statutory provisions. He finds nothing in the statute to indicate that Congress intended the Department to develop procedures such as the one commenter suggested and believes that to do so would impose an unnecessary regulatory burden.

Change: None.

Comment: A commenter believed the regulations should clarify the status of handicapped students over the age of 18 whose handicapping condition is such as to affect their ability to understand and/or exercise their rights under the Act.

Discussion: The Secretary has carefully considered this question in light of the fact that at age 18 the rights transfer from the parent to the student. He has decided that a student who is so severely handicapped as to prevent the student from exercising his or her rights under the Act would in most cases be under the legal care or guardianship of another person or entity. In the absence of a court's order of guardianship, the Secretary believes it would be reasonable to presume that the parents of such a student are the persons who are in the best position to act on behalf of the student. Therefore, the Secretary has decided that no specific provision in the regulations is necessary.

Change: None.

Comment: One commenter was concerned about the statement in the proposed regulations that provides that an individual does not have rights in components of an "agency or institution at which the individual has never been in attendance." The commenter questioned whether a student who is enrolled in one component of a University and takes one course in another component is considered to be a student in attendance at, and with rights in, both components. The commenter believed the provision could result in the disclosure of records by a component of the institution in which the student has never been in attendance.

Discussion: In revising the regulations, two significant phrases were unintentionally omitted from the statement. The statement should have read, "If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission but has never been in attendance." Concerning the commenter's specific question, if an individual applied for but was not admitted to a component, the individual would have no rights with regard to his or her application for admission to that component. This result is consistent with extensive legislative history on the subject. However, if an individual took a course in the component to which he or she had been denied admission, that individual would have FERPA rights with respect to that course, but still would not have rights with respect to the denied application for admission to that component.

Change: The phrases "is or has been in attendance at" and "to which the individual has applied for admission" have been added.

Comment: A commenter was concerned that an institution might misinterpret the language in this provision to mean that a student would not have rights with respect to records which happen to be maintained in a component other than the component in which the student is enrolled.

Discussion: A student cannot be denied access or other rights with respect to his or her education records, regardless of location.

Change: None.

Comment: A commenter suggested that the words "his or her parent" in this section be changed to "the parents" and the words "parents of students" be changed to "parents."

Discussion: In revising the regulations, the Secretary changed the definition of "parent" to eliminate the need to refer to "the parent of the student" or "his or her parent" throughout regulations. The need for changing the terminology in this section was overlooked.

Change: The terminology has been revised to read "parents."

Section 99.6 What information must an educational agency's or institution's policy contain?

Comment: One commenter believed an educational agency or institution should be required to include in its policy a statement that grades may not be appealed.

Discussion: The legislative history of FERPA indicates that the Act was not intended to be used to replace previously established procedures to appeal the grade given the student's performance in a course. However, given the discretion delegated to educational agencies or institutions in implementing FERPA, an agency or institution might choose to permit parents of students or eligible students to use FERPA procedures to challenge a grade. Therefore, the Secretary has decided that it is not necessary or appropriate to require educational agencies and institutions to state in their policies that a student's grade may not be appealed.

Change: None.

Comment: Another commenter expressed agreement with the revisions made in this section with regard to the written policy each educational agency or institution must adopt. However, the commenter seemed to believe that the regulations required an educational agency or institution to publish its policy as part of its annual notification and that this requirement was being removed in revising the regulations.

Discussion: The only revisions made in this section, which was previously numbered 99.5, were made for the purpose of clarification. Neither the current nor the revised regulations require that an educational agency or institution include its policy in the annual notification. Both regulations require that the annual notification include a statement of where the policy may be obtained.

Change: None.

Section 99.7 What must an educational agency or institution include in its annual notification?

Comment: One commenter believed the intent of the law is that educational agencies and institutions be required to "make notification available" to parents or students rather than to "notify" parents or students. Therefore, the commenter suggested that the word "notify" in the first paragraph of the section be replaced by the words "make notification available."

Discussion: The statute requires educational agencies and institutions to inform the parents or the eligible students of the rights accorded them by the Act. In order to inform the parents or the eligible students of their rights, educational agencies and institutions would be required to notify, not simply make notification available.

Change: None.

Comment: One commenter pointed out that the revised regulations would require educational agencies and institutions to notify parents of students in attendance "and" eligible students in attendance whereas the former regulations required that parents "or" students be notified.

Discussion: The use of the word "or" can connote the idea that an educational agency or institution has an option either to notify parents of all students -- whether the students are eligible or not -- or to notify only eligible students. Conversely, use of "and" could be construed to require disclosure to eligible students and all parents, whether or not they were the parents of noneligible students. The word "and" is used in this section with the understanding that in the phrase "parents and eligible students" the word "parents" means the parents of students who are not eligible students. Thus, the requirements in question apply both to eligible students and to parents of students who are not eligible students.

Change: None.

Comment: One commenter, writing on behalf of an institution of higher education, believed language should be inserted to relieve notification requirements with respect to parents who reside outside the continental United States. The commenter also believed agencies and institutions should not be required to notify parents of students who have a primary or home language other than English if the student has demonstrated the minimal command of the English language required for admission to the institution.

Discussion: The statute requires that educational agencies or institutions inform the parents or students of their rights. It does not, however, require that the parents or students be notified individually; a general notification, such as by publication in a newsletter or college bulletin, is adequate. The requirement that an agency or institution notify parents of students who have a primary or home language other than English applies only to elementary and secondary schools. Institutions of higher education are not required to inform parents of rights, just eligible students.

Change: None.

Comment: One commenter asked for information on how educational agencies and institutions are to notify former students of their rights and the agency's or institution's policies.

Discussion: Both the current regulations and the revised regulations provide that notification must be given only to parents of students in attendance or eligible students in attendance. The notification of rights and policy need not be provided to former students or their parents. In any case, as noted in the discussion of the preceding comment, a general notification by publication in a newsletter or college bulletin is adequate to satisfy the statutory and regulatory requirements.

Change: None.

Section 99.10 What rights exist for a parent or eligible student to inspect and review education records?

Comment: A commenter believed there was a need to clarify the requirement that an educational agency or institution comply with a request for access to records within "a reasonable period of time, but in no case more than 45 days after it has received the request." The commenter indicated that the regulations should emphasize that it is quite often reasonable to provide access within a shorter period of time than the 45-day limit.

Discussion: The Secretary finds that, in practice, schools often provide access within a period of time which is considerably shorter than the 45-day limit. He has decided that the phrase "but in no case more than 45 days" serves to emphasize that 45 days is the maximum time allowed for compliance.

Change: None.

Comments: Two commenters were of the opinion that parents should be entitled to obtain copies of the education records of their children. Both commenters indicated that having copies of the records would provide protection against a school's losing or misplacing records. One of the commenters believed the provision would be particularly beneficial for families who move to a new location, in the event the education records are misplaced or lost in transit or in the event transfer of the records is delayed. The other commenter believed such a provision would also relieve schools of the necessity of determining when a denial of copies would effectively result in a denial of access.

Discussion: Both the current and the revised regulations set forth conditions which apply to the disclosure of information to other educational agencies and institutions in which a student seeks or intends to enroll. One of the conditions is that an agency or institution which transfers records to another agency or institution must give the parent or eligible student, upon request, a copy of the record that was disclosed. This is required by statute.

The second case in which an educational agency or institution must provide copies is when a parent or student gives a written consent for the disclosure of information from the student's education records and requests a copy of the records disclosed. This is also a statutory requirement.

The current and the revised regulations also require an educational agency or institution to provide copies of education records if a failure to do so would effectively result in a denial of access, and to include in their written policy a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of education records. These requirements, while not specifically stated in the statute, are necessary to implement the statutory requirement that an educational agency or institution shall not have a policy of denying, or effectively preventing, a parent or student the right to inspect and review the education records of the student.

The Secretary has decided that it would impose an unnecessary burden to require educational agencies or institutions to provide copies except as is now required by statute and the implementing regulations. However, nothing in the statute or the regulations would preclude an educational agency or institution from adopting a policy of providing copies in other cases, if it so chooses.

Change: None.

Comments: Two commenters believed the provision that prohibits educational agencies and institutions from destroying records, if there is a pending request for access, should be expanded. Both commenters believed educational agencies and institutions should be required to notify parents prior to destruction of documents and afford them an opportunity to inspect and review or obtain the records.

Discussion: The Secretary had decided that such a requirement would impose an unnecessary burden on educational agencies and institutions. In many cases, State law or agency or institutional policies and procedures prescribe a period of time in which education records are required to be maintained. Nothing in the Act or these regulations would preclude an educational agency or institution from implementing a policy of notifying parents or eligible students prior to the destruction of any education records.

Change: None.

Comments: One commenter expressed concern about the provision that accords an eligible student the right to have his or her medical treatment records reviewed by a physician or other appropriate professional of the student's choice. The commenter questioned whether postsecondary institutions would be obligated to verify the credentials of the professional chosen by the student.

Discussion: This provision is based on a requirement in the statute. The provision describes the rights of inspection and review of education records in the revised regulations. Neither the statute nor the regulations prescribe any procedures for verification.

Change: None.

Comments: One commenter believed that a provision in this section lends support to parents who claim they should have the right to have access so long as they are supporting the student in college. The provision in question reads "* * * each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student." It is the phrase "parent or eligible student" that the commenter believed lends support to the parent's claim.

Discussion: The word "parent" in the phase "parent or eligible student" means the parent of a student who is not an eligible student. Thus, at the college level, FERPA affords the eligible student the right of inspection and review. FERPA does not, however, prohibit an educational agency or institution from disclosing the education records of an eligible student to the parents of the eligible student if the student is a dependent child as defined in section 152 of the Internal Revenue Code of 1954. The provision which allows educational agencies and institutions to disclose information to parents of eligible students is set forth in the section entitled "Under what conditions is prior consent not required to disclose information?"

Change: None.

Section 99.11 May an educational agency or institution charge a fee for copies of education records?

Comments: One commenter believed fees for copying should be limited to the actual cost of reproduction. The commenter believed that unless fees are limited to the actual cost of copying, an educational agency or institution might incorporate into the fee costs for search and retrieval of education records. A second commenter indicated that an educational agency or institution should be allowed to charge a fee for search and retrieval; if done manually, and for any other costs incurred in providing copies.

Discussion: Educational agencies and institutions are entitled to charge reasonable fees for the actual cost of reproduction, secretarial time, and postage. The Secretary considered whether to include a provision to allow educational agencies and institutions to charge a fee for search and retrieval. He decided that providing parents or students access to education records is a function that is generally a part of the accepted and normal business of educational agencies and institutions.

Change: None.

Section 99.12 What limitations exist on the right to inspect and review records?

Comment: One commenter was concerned about the removal of the provision that required educational agencies and institutions to document the confidentiality of letters and statements of recommendation that were placed in the education records of a student prior to January 1, 1975. The commenter believed that the requirement provided the only reliable way of determining that a letter or statement was indeed "confidential."

Discussion: The provision was removed because it placed an undue burden on agencies and institutions to expect that they would be able to document the confidentiality of letters or statements that were solicited or sent and retained more than 10 years ago.

Change: None.

Comment: A commenter raised a question relating to the provision that an educational agency or institution cannot require a waiver as a condition for admission to or receipt of a service or benefit from the agency or institution. With that in mind, the commenter asked whether a placement office would be denying a service or benefit to a student by advising the student that a professor will not write a letter of recommendation or an employer will not accept a letter of recommendation, or both, unless the student signs a waiver.

Discussion A faculty member's refusal to write a reference without a waiver would be considered an action of that individual and not of the agency or institution. A placement office would not be denying a service or benefit by advising the student of the faculty member's or employer's refusal.

Change: None.

Comment: One commenter believed the provision in this section that allows an applicant for admission to waive his or her right under certain conditions should be removed.

Discussion: The provision is required by statute. Therefore, the Secretary has no authority to remove it from the regulations.

Change: None.

Section 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

Comments: Two commenters believed that a parent or student should have the option of inserting a statement in an education record without first going through the hearing process that is provided in this section. The commenters interpreted the statute as intending that an educational agency or institution must provide a parent or a student both an opportunity for a hearing and an opportunity to insert a statement in the record. They believed the regulations misapply the statute's intent by requiring that a parent or student go through the hearing process before exercising the right to place a statement in the record. One of the commenters stated that this requirement can result in extensive delay in cases where a parent's or student's interest in inserting a clarifying statement in the record is time-sensitive.

Discussion: The statute provides that the parents or students must be afforded "an opportunity for a hearing * * * to challenge the content of [the] records and to provide an opportunity for the correction or deletion of [data] and to insert into [the] records a written explanation * * * respecting the content of [the] records." The statute is not definitive on the question of whether the parent's or student's right to place a statement in the records exists independent of the hearing process. However, the Secretary believes that the order in which the hearing and the statement are addressed in the statute indicates that the Congressional intent was that a parent or student should exhaust the administrative remedy afforded by the hearing process before exercising the right to place an explanatory statement in the record.

After considering this issue, the Secretary has decided that to require a hearing would be burdensome in cases where an educational agency or institution and the parent or student are clearly in agreement that an explanatory statement alone is the appropriate remedy. If one or the other of the two parties disagrees, then the parents or eligible student must exhaust the remedy afforded by the hearing process before entering an explanation in the record. The Secretary finds no reason to regulate on this issue since it may be resolved by the two parties involved.

The Secretary has also considered whether an agency or institution could be required to allow a parent or student to insert a statement in the record if the parent or student considers the matter to be time-sensitive. There is no FERPA provision which would require an agency or institution to expedite the process in a situation where a parent or student believes time is a factor. The explanatory statement provided for in the regulations is not intended to serve any purpose other than to document the parent's or student's final position on the accuracy of an education record.

Change: None.

Comment: One commenter believed the statement that a parent or student inserts in the education record could provide an unlimited opportunity to enter a statement of disagreement. The commenter suggested that such a statement should be limited to a declaration of disagreement and that the educational agency or institution should have the right to refuse to include information beyond such a declaration.

Discussion: The statute requires that a parent or student be afforded an opportunity to insert into the records "a written explanation * * * respecting the content of [the disputed] records." The Secretary has no authority to require that the statement be limited to a declaration of disagreement.

Change: None.

Comment: One commenter suggested an amendment of the provision which requires that an educational agency or institution discloses a parent's or a student's explanatory statement whenever it discloses the portion of the record to which the statement relates. The commenter believed that educational agencies or institutions with complex or automated recordkeeping systems should not be required to provide a copy of the explanatory statement along with a disclosed record. Instead, the commenter believed agencies or institutions should be allowed to include on the disclosed record a reference to the fact that the explanatory statement exists and will be made available on request.

Discussion: The statute requires that the statement be maintained with the record. The Secretary believes the regutory requirement that the statement be disclosed whenever the contested record is disclosed is necessary to meet the statutory intent.

Change: None.

Section 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclosed information?

Comment: One commenter believed that it seemed inappropriate to require that a student's written consent state the purpose of the release. The commenter seemed to believe that the written consent is intended to be a mechanism to restrict what he assumes is a student's right to have information released from his or her own education records. In interpreting the provision in this way, the commenter believed that requiring the student to state the purpose of the release limited his right to have the records released.

Discussion: The statute requires that the purpose of the release be stated in the written consent; therefore, the Secretary has no authority to remove the provision. The purpose of the written consent is to document that the student consented to a disclosure of information from his or her education records; the consent is not intended in any way to restrict any of a student's rights.

Change: None.

Comment: Another commenter indicated that educational agencies and institutions should be able to accept requests by telephone with proper safeguards.

Discussion: The commenter did not specify whether he or she was referring to requests made by a third party for disclosure of information from a student's education records or a request made by a parent or eligible student to disclose information to a third party. Concerning the former, the regulations do not require that a request be in writing in order for an agency or institution to disclose information pursuant to one of the statutory exclusions permitting disclosure without consent. Concerning the latter, the statute requires an agency or institution to obtain written consent of a parent or eligible student before disclosing information to a third party.

Change: None.

Section 99.31 Under what conditions is prior consent not required to disclose information?

Comment: A commenter believed the term "legitimate educational interest" should be more definitive. The commenter indicated that some institutions interpret the term too broadly while others interpret it too narrowly.

Discussion: The Secretary believes the Department could not make a definitive statement of legitimate, educational interest that would apply to each school district and college and university across the nation. Each educational agency and institution must establish its own criteria, according to its own procedures and requirements, for determining when its school officials have a legitimate educational interest in a student's records.

Change: None.

Comment: Two commenters disagreed with the proposal to add language to clarify that education records may be disclosed without consent to a postsecondary institution in which a student seeks or intends to enroll. The commenters believed the addition expanded the scope of the statute and that the statutory purpose of the provision was to facilitate the transfer of records when a student moves from one public school system to another. In the case of postsecondary institutions, the commenters believed it would be more appropriate to require consent of the parent or the student before transferring records.

Discussion: The current regulations did not clearly specify that postsecondary educational institutions are covered by the exception. The provision has been applicable in practice to postsecondary institutions since enactment of the law. The change to this provision clarifies that "schools" include institutions of postsecondary education.

Change: None.

Comment: A commenter asked that the definition of "financial aid" be explicitly broadened to include all debt's owed to an institution as a result of the student's participation in the institution's programs. The commenter strongly believed that Congress did not intend that an institution should be restricted by the law from collecting any and all debts owed it by students.

Discussion: The statute was intended to provide parents or students some control over the disclosure of information from the student's education records. With certain specified exceptions, including the provision with regard to financial aid, information cannot be disclosed without a student's written consent. The statute refers to disclosure "in connection with a student's application for, or receipt of, financial aid." In that context, the definition of financial aid could not be broadened to include other debts owed the institution.

Change: None.

Comment: One commenter, a representative of a State Department of Education, believed a provision should be included to acknowledge that State law may in some cases be more protective of students' privacy than Federal law, particularly in restricting the conditions under which information can be disclosed without the parent's written consent.

Discussion: The current and revised regulations provide that a State is not prevented from further limiting the number or type of State or local officials to whom disclosures may be made without consent. The regulations also state under the section "What are the rights of eligible students?" that the law and regulations "do not prevent educational agencies or institutions from giving students rights in addition to those given to parents of students." The Secretary has decided that no regulatory purpose would be served by including a provision such as suggested by the commenter.

Change: None.

Comment: A commenter suggested a change in the provision that allows disclosure "to organizations conducting studies for, or on behalf of, educational agencies or institutions [if] the study is conducted in a manner that does not permit personal identification of parents or students by individuals other than representatives of the organization** *." The commenter believed the word "by" should be changed to "to."

Discussion: The word "by" is used in the statute, and the Secretary believes the meaning is clear.

Change: None.

Comment: None.

Discussion: In the notice of proposed rulemaking (NPRM) for these regulations the phrase "parents or students" was used in § 99.31 (a)(6)(ii)(A). However, the statute requires organizations that receive information under this exception to the consent requirement to protect the information "in such a manner as will not permit the personal identification of students and their parents * * *."

Change: The word "or" has been changed to "and" to ensure that both groups are fully protected.

Comment: A commenter believed the educational agency or institution should be relieved in some cases of the requirement of making a reasonable effort to notify a parent or student in advance of compliance with a subpoena. The commenter indicated that in legal actions to which the student is a party, the court process itself requires that any subpoena be served on the opposing party, thereby making any notification effort by the educational agency or institution superfluous.

Discussion: The statutory language requires that parents or students be notified of "all such orders or subpoenas" in advance of compliance. The language was modified in the course of promulgating the current regulations, to require that the agency or institution "make a reasonable effort to notify * * *." The modification was made in recognition that it would be difficult in many cases for the agency or institution to comply with the statutory requirement and in the belief that the modification was in accord with the Congressional intent.

The Secretary has decided that he has no authority to relieve educational agencies or institutions of the statutory requirement that parents and students be notified of "all such orders or subpoenas." The Secretary has also decided that even in cases where the parent or student brings the action, the notification serves to assure that the party serving a subpoena is in fact acting on behalf of the parent or student.

Change: None.

Comment: One commenter suggested that a condition be added to allow a postsecondary institution to contact a parent of an eligible student without the student's consent if the institution suspects that the student has a physical or emotional problem of which the university believes the parent may be unaware and that affects the student's academic or campus life.

Discussion: The Secretary has no authority to regulate an exception to the statutory requirement that at age 18 the rights afforded by FERPA transfer from the parent to the student. However, if an institution determined that the circumstances of a situation were such as to constitute a health or safety emergency and if the university decided that the parent is the party who is in the best position to deal with the emergency, then the disclosure could be made under the section of the regulations that provides for disclosure in those emergencies.

Change: None.

Comment: Four commenters believed a condition should be added to permit disclosure without a student's consent if the agency or institution has reason to believe that the student has provided inaccurate or misleading information concerning his or her academic record to another educational agency or institution, to an employer, to a professional association, or to a governmental agency to whom the student applies for benefits or services.

Another commenter believed educational agencies and institutions should be allowed to disclose information without prior written consent to government officials, including U.S. Senators and Representatives, State legislators, and governors, who have been contacted by a parent or student who believes his or her rights under this law have been violated. The commenter indicated that the agencies or institutions are unable to respond to, or to defend themselves against, the parent's or student's allegations because they cannot release information to the government officials without the parent's or student's written consent.

Discussion: The Secretary understands the concerns of the commenters and has carefully considered whether provisions could be included in the regulations to address the problems. He has decided that the statute is specific in stating the conditions under which disclosure can be made without consent and that he has no authority to include the provisions proposed by the commenters.

Change: None.

Section 99.32 What recordkeeping requirements exist concerning requests and disclosures?

Comment: A commenter suggested that the term "list" be changed to "record" in this section. The commenter indicated that as long as a record of requests for and disclosures of information is maintained, the form of the record is irrelevant.

Discussion: The Secretary did not intend to prescribe the form of the record; the intent was to suggest a convenient way to maintain the information. However, in order to conform to the statutory language, the term "record" will be used.

Change: The term "record" has been substituted for "list."

Comment: One commenter stated that keeping a record of requests for disclosure is impractical and implies that a record must be kept even for requests that are denied. The commenter also believed it impractical to require the record of disclosure to be kept with the education records of the student, inasmuch as most institutions maintain records in computerized formats. Another commenter believed maintaining a record of disclosures without consent is self-incriminating. The commenter also stated that institutions should be free to establish their own retention schedule.

Discussion: The student requires each educational agency and institution to maintain a record, kept with the education records of each student, that will indicate all parties who have requested or obtained access to a student's education records, including those parties to whom the statute permits disclosure without consent. While the statute states that the record should be kept with the education records of a student, it does not intend to require the agency or institution to keep it in one file or in one location. However, it does intend to require the agency or institution to make the record available to a parent or student as part of the parent's or student's general access to the education records. Since parents or students should be able to learn of those parties interested in the records, the record of disclosure should be maintained as long as the agency or institution maintains records on the student.

Change: None.

Comment: A commenter asked whether the placement office of an educational agency or institution would be required to keep a list (record) of all parties to whom a student's credential files were sent if the student had given a blanket consent to release his or her education records without specifying the individual parties.

Discussion: The statutory and regulatory language require an agency or institution to maintain a record of each disclosure.

Change: None.

Comment: One commenter questioned the recordkeeping requirement concerning disclosure and redisclosure of information to parties if prior written consent for disclosure is not required. An educational agency or institution may disclose information to a party if consent is not required with the understanding that that party may redisclose the information to another party to whom information can be disclosed without consent. The agency or institution must keep a record of the parties to whom the disclosure and redisclosures are made and the legitimate educational interests all parties have in the records. The commenter believed the recordkeeping requirement places an undue burden on institutions and that the most reasonable approach is to assert that no information may be redisclosed.

Discussion: The Secretary did not intend any change in the recordkeeping requirement. At the time the final regulations were issued in 1976, the Department had considered whether student consent should be required if disclosure by a party excepted from the consent requirement is to another party excepted from the consent requirement -- even though the institution could disclose information without consent to either excepted party. The Secretary considered, for example, whether an institution that disclosed information to the Department of Education under the Guaranteed Student Loan Program as permitted by the "financial aid" exception, would be required to tell the Department of Education not to make a future disclosure of that information to the bank that loaned the money under the program -- even though the bank could obtain the information directly from the institution under the same exception.

If the Department of Education could disclose the information freely to other excepted parties, there would be no harm done to the consent requirement. However, the student would no longer have a means to discover all of the parties outside the institution who had had access to his or her records without consent. To remedy this problem, the Secretary authorized an institution to disclose information to excepted parties with the understanding it would be redisclosed to other excepted parties, but only if a record of access were kept for all of those parties.

The Secretary did not intend to impose a recordkeeping burden on educational institutions. Rather, the intent was to give a better understanding of the disclosure and recordkeeping requirement with regard to excepted parties.

Section 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

Comment: A commenter believed an example should be inserted in this section to specify that the phrase, "is enrolled in or receive service from the other agency or institution," encompasses consortia, cross-enrollment, joint enrollment, work-study and coordination of such programs among postsecondary institutions and participating agencies and institutions.

Discussion: The Secretary believes the provision, as it now stands, can clearly be construed to encompass the examples included in the comment.

Change: None.

Comment: None.

Discussion: The proposed regulations changed the definition of student to include former students in order to make clear that most rights accorded students in attendance also apply to former students. In cases where the provisions of a section do not apply to former students, the term "students in attendance" is used. The provision in this section that, in the proposed regulations, stated "an educational agency or institution may disclose an education record of a student to another educational agency or institution if the student is enrolled in or receives services from the other agency or institution" would extend the provision beyond the statutory authority and would indicate that an agency or institution could disclose information on former students without consent to another agency or institution if the former student is enrolled in or receives services from the other agency or institution.

Change: The provision has been clarified to state that it applies only to students in attendance.

Section *99.36 What conditions apply to disclosure of information in health and safety emergencies?*

Comments: One commenter believed that the regulations, in stating that the provisions of the section "shall be strictly construed," rightly leaves it to the educational agency or institution to develop its own definition of emergency. The commenter viewed the revision as helpful to educational agencies and institutions and as a step to assure an appropriate deregulation and an appropriate recordkeeping process within the institution on defining when an emergency may arise. Another commenter believed the factors that were removed from the health and safety emergency section in revising the regulations should be reinserted. The commenter believed that the statute specifically directs the Secretary to issue regulations concerning disclosure in a health or safety emergency and also believed that the criteria provided useful guidance.

Discussion: The statute, in setting forth the conditions in which personally identifiable information from an education record or records can be disclosed without a parent's or student's consent, states that "[such a disclosure may be made], subject to regulations of the Secretary in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons." The regulations required that educational agencies or institutions include four specific criteria in the factors to be taken into account in determining whether personally identifiable information from the education records of a student could be disclosed under the section.

The Secretary based his decision to remove the nonstatutory criteria from the regulations on his belief that educational agencies and institutions are capable of making those determinations without the need for Federal regulation. It is the Secretary's opinion that Congress did not intend to require that regulations be promulgated that would impose burdensome requirements on agencies and institutions. He believes the requirement that agencies and institutions strictly construe the provision fully meets the Congressional intent. Nothing in the statute or legislative history prohibits an agency or institution from considering the four specific criteria that have been removed.

Change: None.

Section 99.37 What conditions apply to disclosing directory information?

Comment: One commenter thought the use of the word "and" in the text of the first paragraph under the section was incorrect.

Discussion: In the proposed regulations the word "and" was inserted in place of the word "or" in the phrase "* * * parents of students in attendance and eligible students in attendance * * *." However, replacing the word "or" with the word "and" does not remove all possibility for misinterpreting the provision. As clarification, we note that in the phrase "parents of students in attendance," the word "students" means students who are not eligible students. Thus, the educational agency or institution must notify both all eligible students and the parents of all students who are not eligible students.

Change: None.

Comment: A commenter, a representative of a postsecondary educational institution, believed that the refusal that students are allowed to exercise over the designation of directory information should be limited to the students' address and telephone number. The commenter indicated that the students' right of refusal has in some cases enabled students to commit fraudulent acts with a lessened chance of discovery.

Discussion: The statute provides students the right to refuse to allow the educational agency or institution to designate any or all of the items of information about the directory information.

Change: None.

Section 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

Comment: One commenter believed the Department of Education should give some direction to State schools or institutions that are mandated by State law to allow a student to have access to confidential letters of recommendation to which the student, under FERPA, has waived his or her right of access. The commenter indicated that if placement directors send a credential file that contains confidential letters of recommendation to schools or institutions in States that have those mandates, the schools or institutions will return the file on the basis that the confidentiality of the letters cannot be protected.

Discussion: The Secretary is unable to advise State schools or institutions with respect to the laws of each State. With respect to the Federal law, the statute provides that the access rights afforded by the law shall not operate to make letters and statements of recommendation available to students in institutions of postsecondary education who have executed a valid waiver of the right to inspect and review the letters or statements. In implementing the law, the regulations provide that a postsecondary institution "does not have to permit" a student to inspect and review the letters and statements of recommendation provided the student has executed a valid waiver. Under these provisions, an educational agency or institution is not precluded from providing a student access to a letter or statement of recommendation. Therefore, if a State law requires that a State institution afford a student access to letters or statements of recommendation, the Federal law would not interfere, irrespective of whether the student has executed a valid waiver of his or her right.

Change: None.

Section 99.64 What is the complaint procedure?

Comment: A commenter proposed that the intended meaning of the word timely as it appears in the second paragraph of this section should be defined.

Discussion: The Secretary has decided not to include a definition in the regulations for two reasons. First, the word appears only once in the regulations. Secondly, the meaning of the word would depend largely on the circumstances which are peculiar to each case. A complaint might involve complex circumstances and attempts by a complainant to resolve the issue independently that might reasonably have delayed the filing of the complaint. Such a complaint would be considered timely. Another complaint might involve an allegation of a violation that occurred many years ago and was never pursued despite the full knowledge of the student. In this case, the complaint would not be considered timely.

Change. None.

Section 99.67 How does the Secretary enforce decisions?

Comment: A commenter believed the law should be changed to provide that the Secretary may decide to withhold Federal funding under programs in addition to those administered by the Department of Education.

Discussion: The Secretary has no authority to withhold Federal funds under programs in other Federal agencies.

Change: None.

DEPARTMENT OF EDUCATION

34 CFR Part 99

RIN 1880–AA57

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations implementing the Family Educational Rights and Privacy Act (FERPA), which is section 438 of the General Education Provisions Act. These amendments are needed to implement a provision of the Higher Education Amendments of 1992, which modified the conditions under which records of an institution's law enforcement unit are excluded from the definition of "education records." As amended, FERPA excludes from the definition of "education records," and thereby from the restrictions and rights of access under FERPA, records that are maintained by a law enforcement unit of an educational agency or institution that were created by that unit for the purpose of law enforcement.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the Federal Register or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ellen Campbell, Family Policy Compliance Office, Office of Management, U.S. Department of Education, 600 Independence Avenue, S.W., Washington, D.C. 20202–4605. Telephone (202) 260–3887. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Party Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Postsecondary institutions that have questions relative to any of the requirements in the Higher Education Act regarding disclosure of information about campus safety policies and procedures and campus crime statistics should contact Paula M. Husselmann or Kimberly L. Goto at (202) 708–7888.

SUPPLEMENTARY INFORMATION: On August 11 and December 14, 1993, the Secretary published two notices of proposed rulemaking (NPRMs) for 34 CFR part 99 in the Federal Register (58 FR 42836–42837 and 58 FR 65298–65300, respectively). The second NPRM did not change the proposed regulations but merely asked for additional public comment based on the response to the first NPRM.

The proposed regulations define for the first time both "law enforcement unit" and "disciplinary action or proceeding." In contrast to law enforcement unit records, the Department has been legally constrained to treat the records of a disciplinary action or proceeding as "education records" under FERPA (20 U.S.C. 1232g), that is, protected against non-consensual disclosure except in statutorily specified circumstances and subject to inspection and review by parents and eligible students. The Secretary proposed the definition of "disciplinary action or proceeding" to help institutions distinguish disciplinary records from law enforcement unit records, which are excluded by statute from the definition of "education records" in the circumstances specified.

Many of the public comments received on the first NPRM challenged the Department's position on this issue and expressed the view that records of institutional disciplinary proceedings taken against students accused of criminal and other non-academic misconduct should not be considered "education records" under FERPA and should be available to the public even without the parent's or student's consent. This issue, which has been the subject of recent media attention, took precedence over the issue of law enforcement unit records in the comment process. The Secretary sought additional public comment on the issue because it raised important and sensitive concerns about campus crime as well as students' need for privacy and access to records in the educational process.

The Secretary remains legally constrained to conclude that records of an institution's disciplinary action or proceeding are "education records" under FERPA, not law enforcement unit records, and that excluding these records from the definition of "education records" can be accomplished only through a statutory amendment of FERPA by Congress. In support of this view, Congress enacted in 1990 a new statutory provision permitting non-consensual disclosure of only the *results* of disciplinary proceedings conducted by postsecondary institutions; the disclosure is limited to the alleged *victim* of a *crime of violence* as defined in the United States Code and not to the public generally. However, the Secretary also recognizes that the issue of full public access to disciplinary hearing records concerning criminal and other non-academic misconduct is an important part of the ongoing debate concerning safety on college campuses and believes that, given the competing interests involved, these issues need to be aired and argued in the legislative arena. Therefore, the Secretary has notified Congress of the need to address this issue and has offered to work with Congress in drafting an appropriate FERPA amendment that identifies and balances these interests at various education levels.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRMs to comment, approximately 150 parties submitted comments on the proposed regulations. An analysis of the comments and changes in the regulations since publication of the NPRMs follows. Substantive issues are discussed under the section of the regulations to which they pertain.

Section 99.3 What definitions apply to these regulations? Definition of "Disciplinary action or proceeding."

Comments: A majority of commenters approved of the Secretary's effort to effectively clarify the distinction between disciplinary records and law enforcement unit records. Those commenters stated that to allow the release of student disciplinary records to the public without consent would compromise what they believe to be the fundamental educational mission of the campus judicial process. Several commenters also stated that if FERPA were amended to allow such disclosures, institutions would have to amend their disciplinary procedures to incorporate greater due process protections. These commenters, mostly officials at postsecondary institutions, argued that campus judicial systems have been effective in responding to violations of institutional policy because of the privacy protections afforded to students by FERPA.

A substantial minority, however, disagreed and stated that disciplinary records relating to criminal and other non-academic conduct should not be treated as "education records." They argued that postsecondary institutions have used FERPA to evade efforts by the public to gain access to information about crime on campuses. These commenters questioned the statement in the NPRMs that the Department has always considered records relating to an institution's internal proceedings that deal with violations of its own rules and standards of student conduct as "education records" under FERPA. The commenters believe that the Department's position in this matter represents an effort to circumvent the recent State court ruling, *Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257, 261 (Ga. 1993), which considered records of a disciplinary action against a student fraternity outside the definition of "education records" and, thus, outside the privacy protections of FERPA. Several commenters also requested that the proposed definition of "disciplinary action or proceeding" be changed to include only violations of academically-related rules and that disciplinary action taken against a student for criminal acts be excluded.

Discussion: The Secretary has carefully analyzed the statutory and regulatory authority to address these concerns. Based on the broad definition of "education records," which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are "education records" subject to FERPA. It is noted that *Red & Black Publishing Co. v. Board of Regents* concerned records of a student "organization court," which disciplined a student *organization* (fraternity) for a rules violation, and did not concern disciplinary action against an individual student. More recently, another State court ruled that FERPA prevented a university from releasing to the media personally identifiable information from student disciplinary records without consent. *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport*, Case No. 393,332, First Judicial District Court, Caddo Parish, LA, (March 4, 1994). Although the Secretary is equally concerned with the problem of crime on campus, it is clear that only Congress has the authority to change the statutory provisions of FERPA to permit disclosure of disciplinary records without prior consent.

Nevertheless, because crime on our Nation's college campuses has escalated since 1974 when FERPA was enacted, the Secretary has notified Congress of the need to address this important issue. The Congress may find that public access to disciplinary records concerning criminal and other non-academic misconduct is an appropriate response to the problem of maintaining safe college campuses, and the Secretary has offered to work with Congress in writing an appropriate amendment to FERPA.

The Secretary received very few comments from State and local educational officials on how the proposed definition of "disciplinary action or proceeding" might affect elementary and secondary schools. Issues regarding the privacy of minor students and their families on the elementary and secondary level may require different treatment than those of postsecondary students. At this time, FERPA is consistent with those State laws that protect information regarding juvenile offenders.

Change: None.

Comments: Even among those commenters who approved of the proposed definition of "disciplinary action or proceeding," several postsecondary officials noted that it is important that institutions be able to tell victims the outcome of a disciplinary proceeding regarding their assailant.

Discussion: Section 99.31(a)(13) of the FERPA regulations, which implements 20 U.S.C. 1232g(b)(6) of the statute, permits postsecondary institutions to disclose to an alleged victim of a crime of violence, as defined in the United States Code, the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator. As noted earlier, this specific statutory exception to the prior written consent rule, enacted in 1990 as part of the Student Right-to-Know and Campus Security Act, demonstrates Congress' view that disciplinary records are education records under FERPA. Additionally, 34 CFR 668.47(a)(12)(vi) (Student Assistance General Provisions) provides that in cases of an alleged sex offense both the accuser and the accused *shall be* informed of the outcome of any institutional disciplinary proceeding at the postsecondary level. On the elementary and secondary level, Congress has made no changes to FERPA that would allow a school official to disclose information relating to a disciplinary action without the prior consent of that student's parents, to an alleged victim or the alleged victim's parents. The Secretary has no authority to change these statutory provisions to provide for disclosure of information from disciplinary records other than in the circumstances identified.

Change: None.

Comments: Some commenters noted that conduct that would constitute a criminal violation should not be kept confidential as part of a campus disciplinary proceeding and that disciplinary hearings should be open to the public. In contrast, a number of school officials stated that to allow disciplinary hearings to be open to the public would substitute those processes for criminal proceedings, which would negate a long-standing separation of an on-campus disciplinary system from the criminal justice system.

Discussion: FERPA does not prevent an institution from opening disciplinary proceedings to the public. Rather, FERPA prevents the non-consensual disclosure of education records or personally identifiable information from "education records," unless the disclosure meets one or more of the statutory conditions for non-consensual disclosure. Schools routinely restrict access to disciplinary proceedings to those school officials with a "legitimate educational interest," which is the first condition for non-consensual disclosure under section (b)(1) of the statute, because information from "education records" is frequently disclosed in a disciplinary hearing.

As discussed above, the Secretary has advised and offered to work with Congress toward an appropriate solution to the concern about campus safety issues in relation to FERPA.

Change: None.

Comments: Several commenters expressed concern that, as parents, they would want to know how many sexual assaults had been reported at the schools to which their children had applied or at which their children were attending. These commenters believed that disciplinary records related to criminal conduct should not be considered "education records."

Discussion: Parents and students at the postsecondary level may currently obtain information about the type and the amount of crime on college campuses under 34 CFR 668.47(a)(6) (Student Assistance General Provisions), which implements the Student Right-to-Know and Campus Security Act. These provisions require postsecondary institutions to report annually statistics concerning the occurrence on campus of certain crimes, including sexual assaults, that have been reported to local police agencies and to any official of the institution who has significant responsibility for student and campus activities. The Secretary is enforcing these requirements fully and believes that they will make students—and their parents—aware of the nature and the amount of crime on any college campus they may attend or which they are considering attending.

Change: None.

Comments: One commenter noted that the definition of "disciplinary action or proceeding" does not specifically state that disciplinary records are education records, thus leaving open to interpretation whether they are "education records" subject to FERPA. Another commenter suggested that the definition be changed to include all appeals of the initial adjudication or imposition of sanctions.

Discussion: Under FERPA, the statutory definition of "education records" is all inclusive, covering "those records, files, documents, and other materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A). The only types of records specifically identified in FERPA are those that are specifically excluded from the definition of "education records," such as law enforcement unit records. 20 U.S.C. 1232g(a)(4)(B). FERPA does not list, identify, or single out any particular type of materials or documents as "education records." Consequently, the regulations explain that records of a law enforcement unit do not include or mean disciplinary records. That is, they are not excluded from the definition of "education records" under FERPA.

Change: None.

Section 99.8 What provisions apply to records of a law enforcement unit?

Definition of "law enforcement unit".

Comments: One commenter, a State assistant attorney general, interpreted the proposed rules to mean that if a school principal or dean maintained a record on a student in a discipline file it would be an "education record" protected by FERPA, but that the same record maintained by the institution's law enforcement unit would not be protected by FERPA and could be disclosed to an outside party directly from the campus law enforcement unit. A school official also commented that, under the proposed definition, it is not clear whether using law enforcement unit records during a disciplinary proceeding would render the records "disciplinary records" and thus "education records" subject to FERPA. A commenter from a State educational agency asked for clarification on whether a record of a law enforcement unit can lose its status and become an "education record."

Discussion: FERPA was amended by Congress to exempt from the definition of "education records" those records that are created by a law enforcement unit for a law enforcement purpose and maintained by that law enforcement unit, thus allowing educational agencies and institutions to disclose these records publicly without obtaining prior written consent. If a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a dean, principal, or other school official for use in a disciplinary proceeding, that copy is an "education record" subject to FERPA if it is maintained by the dean, principal, or other school official and not the law enforcement unit. The original document created and maintained by the law enforcement unit is not an "education record" and does not become an "education record" merely because it was shared with another component of the institution.

Change: None.

Comments: A few commenters said that the proposed definition of "law enforcement unit" was too broad and could encompass offices or components within an institution that may maintain information directly related to students but that are responsible for the institution's compliance with Federal civil rights laws, financial aid regulations, hiring requirements, etc., which should not be considered law enforcement activities under FERPA. It was also suggested that the definition be limited to enforcement of "criminal" laws.

Discussion: The proposed definition is intended to cover that part of the institution which is responsible for providing and maintaining a safe and orderly school environment by monitoring and dealing with the conduct of *individuals*, not the institution itself. After considering these comments, the Secretary agrees that the definition is potentially too broad and may encompass functions of the institution, such as an office of legal counsel, that should not be included. However, the Secretary believes that adding "criminal" to the definition might unnecessarily restrict or confuse school officials as to their responsibilities for ensuring school safety.

Changes: The Secretary has revised the definition of "law enforcement unit" by adding a new provision to clarify that it pertains to those individuals or parts of the institution responsible for maintaining the safety and security of school surroundings and for enforcing laws against individuals and organizations within the school community and not those responsible for the institution's own compliance with various laws.

Comments: Several commenters associated with postsecondary institutions stated that they did not believe, for various reasons, that their campus security departments were "law enforcement units" under FERPA and requested clarification on the status of the records of what they considered a "non-law enforcement" campus security department. Some commenters also noted that a majority of colleges and universities do not employ "campus police officers" who possess police authority or perform official police functions. Instead, many institutions employ non-commissioned "campus security officers" whose main function is to keep the peace and enforce institutional policies. Another commenter noted that the definition of "law enforcement unit" was potentially confusing because student conduct code offenses are considered violations of the "law" and that an office that is responsible for student conduct might be considered a "law enforcement unit" under the definition.

Discussion: The Secretary has taken into consideration these comments and has revised the regulations to clarify that the term "law enforcement unit" under FERPA includes "a unit of commissioned police officers or non-commissioned security guards." That is, security departments such as those described by the commenters would be considered "law enforcement units" if they are officially authorized or designated by the institutions to carry out the functions listed in the regulatory definition, regardless of whether the individuals of that unit are commissioned police officers. The second part of the definition of law enforcement unit makes it clear that a security department retains its status as a "law enforcement unit" even if it also has responsibility for enforcing the institution's code of student conduct.

Change: The definition has been revised to state that it applies to units consisting of commissioned police officers as well as non-commissioned security guards.

Comments: One commenter, an official at a major university, stated that the law enforcement unit at that institution generates both "crime reports," which it considers public documents, and "incident reports," which are treated as education records and referred to the student affairs office for disciplinary purposes. The official further stated that he believes that the functions of the law enforcement unit and the functions of the student affairs office charged with administering the student discipline system are intertwined at his institution as they are at other institutions.

Discussion: If an institution has a security unit or individual with a dual role or function of enforcing institutional rules of conduct related to safety and security and referring potential or alleged violations of law to government authorities, that unit or individual would be considered a "law enforcement unit" under FERPA. Under the new amendment, records of that unit that were created and maintained *for a law enforcement purpose* are considered records of a law enforcement unit and, therefore, excluded from the definition of "education records" under FERPA.

The Secretary has revised the proposed regulations to clarify that where a law enforcement unit also performs non-law enforcement functions, the records created and maintained by that unit are considered law enforcement unit records, even where those records were created for dual purposes (e.g. for both law enforcement and disciplinary purposes). Only records that were created and maintained by the unit *exclusively* for a non-law enforcement purpose will not be considered records of a law enforcement unit. For example, if a campus security unit initiates an investigation into an incident on campus relating to a possible violation of law or the student conduct code, the record created and maintained by the unit in connection with this investigation is a law enforcement unit record, whether or not it is ever referred to the local police authorities. If, however, the same unit or individual responsible for law enforcement investigates an incident for the purposes of internal disciplinary actions and creates a record *exclusively* for the purpose of a possible disciplinary action against the student, that record would not be considered a record of a law enforcement unit and would be an "education record" subject to FERPA. It should be stressed that the Secretary expects such occasions to be very rare, especially with incidents involving criminal conduct by students at postsecondary institutions.

Postsecondary institution officials should note also that when they decide to refer a matter to a disciplinary committee rather than to the institution's own law enforcement unit or directly to governmental law enforcement authorities, the institution is not relieved of its responsibilities for complying with the reporting requirements of the Student Right-to-Know and Campus Security Act, as codified in 34 CFR 668.47(a)(6) (Student Assistance General Provisions).

Changes: The definition has been clarified by the insertion of the word "exclusively" to indicate records created and maintained exclusively for internal disciplinary purposes are not law enforcement unit records and are, therefore, not excluded from the definition of "education records."

Comments: One commenter suggested that the regulations be changed to allow institutions that may not have a law enforcement unit to publicly disclose records that relate to a criminal act but which are not necessarily related to a disciplinary action.

Another commenter expressed concern that, because most public elementary and secondary schools do not have a "law enforcement unit," an individual administrator could be considered a "law enforcement unit" under the proposed definition. The commenter believed this dual role of school administrator and law enforcement official could pose a potential problem for abuse because of his or her access to both education records and law enforcement unit records. He stated that, in such a circumstance, a school official could "essentially confer or remove parents' rights of access to records, or maintain or eliminate confidentiality with respect to certain records by choosing to characterize documents as education records or records of a law enforcement unit."

Discussion: The Secretary has carefully considered whether provisions should be included in the regulations to address these concerns. The definition of "law enforcement unit" has been clarified by adding the term "officially" to describe an office, department, or *individual* who is authorized or designated by the agency or institution to perform law enforcement unit functions. Additionally, a subsection has been added to the definition to further describe a "law enforcement unit" as an *entity or individual* whose function is to maintain the safety and security of the institution.

The inclusion of the term "individual" is intended to permit small educational agencies and institutions to designate a single individual responsible for "law enforcement" and related safety and security functions. The records created and maintained by that individual *for a law enforcement purpose* may be disclosed, without prior consent of the parent or eligible student to whom the records relate, and the parent or eligible student would have no right to inspect and review the records under FERPA. The Secretary believes that the benefits gained by safer school surroundings outweigh any potential problems for abuse of the privacy or access rights under FERPA that might occur by including "individual" in the definition.

However, the Secretary does not have the authority to change the regulations to allow institutions that do not have a law enforcement unit to publicly disclose records that relate to a crimin[illegible] act. Such a change would have to be made by Congress.

Change: The Secretary has revised the definition of "law enforcement unit" to include only entities or individuals officially authorized or designated by an agency or institution to enforce local or State law, or to refer to appropriate authorities a matter for enforcement of these laws, or to maintain the physical security and safety of the agency or institution.

Comments: A couple of commenters from State departments of education noted that the definition of law enforcement unit should be clarified to include a city police officer hired by a local educational agency or through special arrangements with local law enforcement authorities.

Discussion: The Secretary believes that the definition of "law enforcement unit" which includes the term "individual," as discussed in the previous comment, will allow schools to designate a single individual responsible for "law enforcement" and related safety and security functions. However, educational agencies and institutions should also be aware of the requirement under § 99.6 of the FERP[illegible] regulations to adopt a policy regarding how the agency or institution meets the requirements of FERPA. In that policy, educational agencies and institutions are required to include a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. If agencies and institutions have a policy of disclosing information from education records to officials of their own law enforcement unit, the officials of that unit must be designated under the school's FERPA policy as school officials with a legitimate educational interest. The Department can provide further guidance on the formulation of such a policy.

The Secretary encourages educational agencies and institutions that do not have a separate law enforcement unit to develop working relationships with local police authorities. However, FERPA currently prohibits schools from disclosing information from education records to local police authorities absent the prior written consent of parents or a lawfully issued subpoena or court order.

Changes: None.

Comment: One commenter expressed concern that the proposed regulations do not permit officials of an institution's law enforcement unit to disclose information that the unit had obtained from a student's education records to local police or prosecutors. He believes that the regulations, as proposed, would impede the institution's ability to investigate students suspected of falsified time sheets, transcript forgery, computer fraud, and similar crimes that may be demonstrated by documents considered "education records" under FERPA.

Discussion: An institution may disclose education records to an outside law enforcement agency without consent to comply with a judicial order or lawfully issued subpoena. The Secretary does not have the statutory or regulatory authority to permit the non-consensual disclosure of education records to outside law enforcement authorities in other circumstances. Any changes to this provision would have to be made by Congress.

Changes: None.

Comment: The same commenter proposed that § 99.8(c)(1) be changed by replacing "contacting its law enforcement unit, orally or in writing" with "disclosing education records or information from education records to its law enforcement unit."

Discussion: This provision was included in order to clarify that the Secretary would not consider an institution "contacting" its own law enforcement officials regarding suspected criminal activity to involve necessarily the disclosure of information from an education record, which the institution would not be permitted to do under FERPA unless those individuals had been designated in the school's FERPA policy as "school officials" with legitimate educational interest in accordance with 34 CFR 99.6.

Additionally, as referenced in the previous comment, FERPA does not permit any party, including the institution's own law enforcement unit, that has received information from education records to redisclose that information without the prior consent of the parent or eligible student or in accordance with one of the exceptions listed under 34 CFR 99.31, which includes disclosure in compliance with a judicial order or lawfully issued subpoena.

Changes: None.

Comments: A commenter from a large metropolitan school district agreed that exempting law enforcement unit records from the definition of "education records" promotes cooperation between local police agencies and local educational agencies in their efforts to reduce violence on school campuses. He further stated, however, that to regard disciplinary records as "education records," which cannot be disclosed to the school district's own law enforcement unit, obstructs a law enforcement unit official's ability to maintain a safe school environment. In contrast, a commenter from a State educational agency, who agreed with the Secretary's proposed regulatory definition of "law enforcement unit," stated that the proposed change would allow schools to disclose to the public records created and maintained by school law enforcement units. He further noted, without explanation, that the change would assist public schools in working with local law enforcement authorities and other agencies to provide the best education for students in a safe environment conducive to learning.

Discussion: With regard to the first commenter's concern that FERPA prevents the disclosure of information from disciplinary records to the school district's designated law enforcement unit, as discussed in the previous comment section, FERPA does not prevent such a disclosure if the officials of the law enforcement unit have been designated as "school officials" with a legitimate educational interest under the district's student records policy, as required by 34 CFR 99.6. However, FERPA does prohibit an educational agency or institution from disclosing information from education records, including information from disciplinary records, to an outside, governmental law enforcement authority, except in certain circumstances such as in response to a judicial order or lawfully issued subpoena, provided notice requirements of § 99.31(a)(9) have been met. As previously noted, the Secretary does not have the statutory or regulatory authority to permit the non-consensual disclosure of information from education records, such as disciplinary records, to third parties, including governmental law enforcement authorities.

Changes: None.

Comments: A few commenters noted that students who are victims of crime should have a right to know about the progress of the investigation of their cases. In contrast, several commenters suggested that information regarding active criminal investigations be protected from disclosure until the investigations have been closed or adjudicated.

Discussion: The Secretary has considered these comments but believes that because agencies and institutions are *permitted,* not *required,* by FERPA to publicly disclose information from law enforcement unit records, schools should develop their own policies with regard to if and when they will disclose the information.

Changes: None.

Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Educational Impact

In the NPRMs, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the NPRMs and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Family educational rights, Privacy, Parents, Reporting and recordkeeping requirements, Students.

Dated: January 10, 1995
Richard W. Riley,
Secretary of Education.

(Catalog of Federal Domestic Assistance Number does not apply.)

The Secretary amends Part 99 of Title 34 of the Code of Federal Regulations as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 continues to read as follows: Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.3 is amended by republishing the introductory text of paragraph (b) and revising paragraph (b)(2) in the definition of "Education records" and by adding a new definition of "Disciplinary action or proceeding" in alphabetical order to read as follows:

§ 99.3 What definitions apply to these regulations?

* * * * *

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

* * * * *

Education records * * *

(b) The term does not include:

* * * * *

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

* * * * *

3. A new § 99.8 is added to subpart A to read as follows:

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[FR Doc. 95-1000 Filed 1-13-95; 8:45 am]

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DEPARTMENT OF EDUCATION

34 CFR Part 99

RIN 1880–AA65

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The amendments are needed to implement section 249 of the Improving America's Schools Act of 1994 (IASA) (Pub. L. 103-382, enacted October 20, 1994), to eliminate unnecessary requirements, reduce regulatory burden, and incorporate several technical changes.

EFFECTIVE DATE: These regulations take effect December 23, 1996.

FOR FURTHER INFORMATION CONTACT: Ellen Campbell, U.S. Department of Education, 600 Independence Avenue, SW., Washington, DC 20202–4605. Telephone: (202) 260–3887. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On March 14, 1996, the Secretary published a notice of proposed rulemaking (NPRM) for 34 CFR part 99 in the Federal Register (61 FR 10664-10669). The preamble to the NPRM included a summary and discussion of the 1994 amendments and other major issues that were addressed in the proposed regulations.

These regulations have been reviewed and revised in accordance with the Department's "Principles for Regulating," which were developed to ensure that the Department regulates in the most flexible, most equitable, and least burdensome way possible. These principles advance the regulatory reinvention and customer service objectives of the Administration's National Performance Review and are essential to an effective partnership with States and localities. The Secretary amends these regulations because he believes they are necessary to implement the law and give the greatest flexibility to educational agencies and institutions. In addition, the regulations minimize burden while protecting parents' and students' rights.

The final regulations include changes made to the statute by the Improving America's Schools Act of 1994 (IASA). The IASA amended FERPA so that State educational agencies are required to afford parents access to education records they maintain. The IASA also amended FERPA to permit nonconsensual disclosures of education records to officials in the State juvenile justice system as permitted by State law and, in certain circumstances, to permit the nonconsensual disclosure of information regarding disciplinary action taken against a student for behavior that posed a significant risk to the student or others.

Additionally, these regulations reflect the Department's effort to reduce unnecessary regulatory burdens. In this regard, the Department is removing the nonstatutory requirement that schools adopt a formal written student records policy. Instead, schools will now be required to include additional information in the annual notification of rights, which is required by statute, to ensure that parents are effectively notified of their rights and how to pursue them.

In reviewing the NPRM with respect to the issue of disclosing education records without consent pursuant to subpoenas and court orders, the Secretary has concluded that the language in this provision of the regulations should be revised to highlight that notification to the parent or eligible student of a subpoena or judicial order allows the parent or student the opportunity to seek protective action to prevent redisclosures. Also, the Secretary clarifies that if an educational agency or institution initiates legal action against a parent or student, the records that can be disclosed are those records of that student that are relevant to the action. These additions are not intended to change the meaning of the regulatory requirements as published in the NPRM, but are merely a clarification of the Department's position on this issue. Changes made in response to the public comments on the NPRM are discussed in the following section.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, twenty-eight (28) parties submitted comments on the proposed regulations. An analysis of the public comments and of the changes in the regulations since publication of the NPRM follows. Substantive issues are discussed under the section of the regulations to which they pertain. Suggested changes and comments outside the scope of the NPRM are not addressed because the Secretary lacks the statutory authority to make the changes.

Annual Notification of Rights (§ 99.7)

Comments: Seven commenters submitted letters in support of the proposal to remove the requirement that educational agencies and institutions adopt student records policies. One commenter stated that the proposed change would not only lessen the burden on schools, but would facilitate communication between the schools and parents or eligible students. This commenter further stated that the cost associated with the change would not be significant because the school district updates its notices regardless of statutory requirements. Another commenter, representing a State educational agency (SEA), stated that the proposed changes would "be of benefit to parents." Another commenter representing a large public university stated that "the flexibility offered by not requiring having such a [student records] policy is a laudable goal * * *. A move toward that type of freedom is a positive one."

Six commenters opposed the proposed change. One commenter stated that the current requirements are not burdensome. Two commenters noted that the policy is helpful in educating school officials about FERPA requirements and that the change in the requirements would be burdensome on schools because they would incur costs to publish a longer notification.

Discussion: The Secretary's purpose in removing the requirement that schools maintain a policy is twofold. Specifically, the Secretary believes that this change will help to ensure that parents and eligible students receive more effective notification of their rights under the law, including how to pursue those rights. Second, the Secretary hopes that the change will afford educational agencies and institutions greater flexibility by removing requirements that are not necessary to implement the law.

With respect to those commenters who noted that the student records policy is helpful in educating school officials about FERPA, the removal of the requirement that educational agencies or institutions adopt a formal student records policy does not prevent schools from maintaining a policy. The Department will continue to update and make available a sample model student records policy for any educational agencies and institutions that want to have a policy.

While the Secretary encourages educational agencies and institutions to develop and utilize student records policies, he also recognizes that the statute does not require that schools have these policies. Because of this regulatory requirement, the Department has had to investigate complaints alleging that the contents of schools' student records policies did not meet the regulatory requirements. Often, the Department found that the policies did not comply.

The removal of the requirement to adopt a written policy aligns the FERPA regulations more closely to the statute and gives educational agencies and institutions flexibility regarding the content of their student records policies. In addition, the amount of Department resources spent on investigating complaints alleging violations of regulatory requirements that are not based on statutory requirements will be reduced.

In response to those comments that expressed concern regarding the burden and cost of publishing additional information in an annual notification, the Secretary has again reviewed the regulations. The Secretary has determined that some of the information proposed to be included in the annual notification is not necessary to meet the statutory requirement. In particular, the Secretary has removed the requirement that the notice list FERPA's exceptions to the prior written consent provision. In addition, the Secretary will not require that the annual notification specify the procedures for a hearing under FERPA's amendment provision, as long as schools provide this information to parents and eligible students seeking to amend education records. Lastly, the Secretary will not require the annual notification to include a reference to directory information.

The Department has created a model annual notification that is not significantly longer than the previous annual notification. The model is available from the address listed in the **FOR FURTHER INFORMATION CONTACT** section of these regulations and is published as an appendix to these regulations. The model is less than two 8½" by 11" pages in length (single-spaced), minimizing any additional burden on an institution. As noted in the NPRM, the Secretary will allow educational agencies and institutions up to three years to transfer from the current policy requirements and to implement the new requirements concerning an annual notification.

Changes: The Secretary has removed proposed § 99.7(a)(3)(ii) (B) and (C), § 99.7(a)(3)(iii), and § 99.7(a)(3)(v). The remaining provisions have been renumbered accordingly.

Effective Notification

Comment: One commenter requested that the regulations specify what would be acceptable notification to individuals with disabilities or those with limited English proficiency.

Discussion: The Secretary believes that each school is best able to determine what would constitute notice that would be reasonably likely to inform parents and eligible students whom it serves. The regulations give schools flexibility to determine how to effectively notify individuals with disabilities and those who have a primary or home language other than English. Schools must provide notice consistent with applicable civil rights laws. Effectively notifying individuals with disabilities may include, for example, providing notice in alternative formats such as audiotape, braille, computer diskette, or large print, as appropriate. Ideally, schools would consult with parents and eligible students in determining how best to provide them with notice.

Changes: None.

Annual Requirement

Comment: One commenter questioned the requirement that an educational agency or institution provide the notification annually. This commenter suggested that notification be made once, when a student first enters the school.

Discussion: The Secretary believes that requiring an annual notification that is reasonably likely to inform parents and eligible students of their rights strikes the proper balance between placing minimal requirements on educational agencies and institutions and ensuring that parents and students are effectively informed of their rights. The Department does not require schools to individually notify parents or eligible students of their rights, but only that they give notice that is reasonably likely to inform the parents and students of their rights.

Changes: None.

Right To Inspect and Review Education Records (Section 99.10)

Comments: Eleven SEAs submitted comments on the NPRM. Most commenters agreed that the Secretary's proposed requirement that access be provided within 45 days is reasonable. One commenter, while generally in favor of the proposed changes, stated that the 45-day time period was too long.

Discussion: Because most comments the Department received stated that the 45-day requirement is reasonable and the statute requires that LEAs respond to requests for access within 45 days, the Secretary believes that making the response time consistent with the statutory requirement for LEAs will be less confusing to parents, students, and school officials.

Changes: None.

Costs Associated With Making Records Available

Comments: One commenter stated that SEAs would incur significant costs producing records for review.

Discussion: The Secretary recognizes that there may be some personnel and resource costs associated with affording access to records. However, § 99.11 of subpart B of the FERPA regulations allows SEAs to charge a fee for a copy of education records that is made for a parent or eligible student. This fee would cover most of the nominal costs associated with making records available to parents and eligible students.

Changes: None.

Duplicate Records

Comments: Two commenters suggested that SEAs should not be required to provide access to records that are duplicates of records maintained by an LEA.

Discussion: The requirement that SEAs provide access to education records is statutory. Congress did not make an exception for duplicate records. There is, therefore, no authority for the Department to limit a parent's or eligible student's right to access records maintained by an SEA, even if the records are duplicates of those records maintained by an LEA.

Changes: None.

Prior Consent Provisions

Comments: Three commenters contended that FERPA's provisions requiring the consent of the parent or eligible student prior to disclosure of education records also should apply to records maintained by SEAs, notwithstanding the source of the records.

Discussion: Congress only requires that SEAs comply with the access provisions of FERPA. SEAs are not required to comply with any of the other provisions of FERPA, such as the written consent requirement or the notification requirement. Accordingly, the Secretary has no authority to require SEAs to comply with FERPA's prior consent provisions.

Changes: None.

SEAs and Annual Notification

Comments: Several commenters representing SEAs asked if the annual notification requirement applies to SEAs and if state-wide notification is required.

Discussion: As discussed in the preamble to the NPRM, FERPA does not apply to SEAs in general. Rather, the only provision in FERPA that applies to SEAs directly is the requirement that SEAs provide parents and eligible students access to education records when so requested. Accordingly, FERPA's notification requirement does not apply to an SEA, unless the SEA is an educational agency or institution under § 99.1 of this part.

Changes: None.

Foster Parents

Comments: One commenter was concerned that there was no proposed provision addressing the rights of a foster parent to inspect and review education records at an SEA.

Discussion: The regulations already define the term parent in § 99.3 to include "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian." Thus, foster parents who are acting as a child's parent would have the rights afforded parents under FERPA with respect to that child's education records.

Changes: None.

Prior Consent Not Required for Disclosures Pursuant to Court Orders and Lawfully Issued Subpoenas (Section 99.31) Subpoenas of Other Issuing Agencies

Comments: Three commenters noted that the NPRM omitted statutory language that allows an educational institution to release education records without notifying the student when an agency (other than a court) issues a subpoena for a law enforcement purpose.

Discussion: The words "or other issuing agency" were inadvertently excluded from the NPRM. The Department did not intend to limit the application of this provision and has corrected the regulations to reflect the statutory language.

Change: The words "or other issuing agency" have been added to § 99.31(a)(9)(ii)(B).

Implied Waiver of the Right To Consent

Comments: Three commenters requested that the Secretary include regulations allowing an educational agency or institution to assume an implied waiver of the right to consent to the disclosure of education records to respond to a lawsuit filed by a parent or student against the agency or institution.

Discussion: While FERPA does not directly address this issue, the Department interprets FERPA to allow an educational agency or institution to infer the parent's or student's implied waiver of the right to consent to the disclosure of information from the student's education records if the parent or student has sued the institution. The Secretary believes this interpretation is sound because an educational agency or institution must be able to defend itself if a parent or student has initiated legal action against the agency or institution. This interpretation, however, does not place a requirement on educational agencies or institutions, and thus it is not included in the regulations.

Changes: None.

Disclosure of Information from Disciplinary Records (Section 99.36)

Comment: One commenter asked if an educational agency or institution may include information regarding disciplinary actions taken against a student other than those for conduct that posed a significant risk to the health or safety of the student or others in a student's education records.

Discussion: Neither FERPA nor the regulations prevent an educational agency or institution from maintaining any type of education records that an agency or institution has deemed necessary or appropriate to maintain. The new statutory provision, upon which the new regulatory provision is based, merely clarifies that nothing in FERPA prevents schools from maintaining, and disclosing under certain circumstances, specific information regarding disciplinary action taken against students.

Changes: None.

Health or Safety Emergency Exception

Comments: One commenter suggested that the new provision regarding disciplinary records be placed in its own section of the regulations, stating that Congress did not include this provision under the health or safety emergency exception to FERPA's prior written consent provision.

Discussion: The new provision governs disclosure of information about a student's behavior that poses significant risk to that student or other individuals. This new provision is closely related to, and logically follows, the existing health or safety exception to the prior written consent provision. The placement of the new provision in the same subpart with the previous health or safety emergency exception does not collapse the two provisions.

Changes: None.

Obligation To Disclose Information

Comments: A couple of commenters asked whether the FERPA provision permitting the disclosure of information concerning disciplinary action taken against a student for behavior that posed a significant risk to that student or other individuals creates a legal obligation to disclose this information, which would make educational agencies and institutions liable if this information were not disclosed.

Discussion: These regulations do not require the disclosure of any information from education records, except to the extent that the regulations afford parents and eligible students the right to access education records. Accordingly, the regulations do not create a legal obligation to disclose information from a student's disciplinary records under FERPA. Rather, the regulations give individual schools the discretion to determine the circumstances under which it is appropriate to disclose information.

Changes: None.

Behavior That Poses a Significant Risk

Comments: Some commenters suggested that the Department should clarify what behavior would constitute "behavior that posed a significant risk" and pointed out that a particular behavior at one institution may be deemed acceptable, and at another be considered putting the individual or others at "significant risk."

Discussion: The Secretary believes that defining a single standard of what constitutes behavior that posed a significant risk would restrict educational agencies and institutions from determining what is appropriate based on specific circumstances found at individual schools.

Change: None.

Transfer of Student Education Records

Comments: Three commenters suggested permitting nonconsensual disclosure of information concerning disciplinary action taken against a student for behavior that posed a significant risk to that student or other individuals if the student has transferred to another school.

Discussion: FERPA has always permitted, under § 99.31(a)(2), nonconsensual disclosure of this information (and other education records) in situations where students are seeking or intending to enroll in another educational agency or institution. If a student has been enrolled in the new institution for a period of time, the Secretary interprets § 99.31(a)(2) to permit educational agencies and institutions to send corrected education records, or additional education records, to the new institution (if it has already sent education records under this exception) as part of an original disclosure.

Change: None.

Students With Disabilities

Comment: One commenter asked if the new provision permitting nonconsensual disclosure of information concerning disciplinary action applies to students with disabilities.

Discussion: FERPA applies to all education records equally, and does not distinguish between the records of students with disabilities and the records of other students. Moreover, the Secretary believes that individual educational agencies and institutions are in the best position to determine what information should be released in a particular situation. However, if a complaint is filed, the Department, through the Family Policy Compliance Office, would investigate the complaint and make a final determination whether FERPA had been violated.

Changes: None.

Disclosure of Information Concerning Juvenile Justice System (Section 99.38)

Comment: None.

Discussion: The Secretary believes that each school, working in conjunction with State and local authorities, can best determine whether a release of personally identifiable information from an education record "concerns the juvenile justice system's ability to effectively serve a student prior to adjudication." Thus, the regulations give schools flexibility in determining whether an education record of a juvenile may be released without the prior written consent of the parent.

Executive Order 12866

Assessment of Costs and Benefits

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary as necessary for administering this program effectively and efficiently. Burdens specifically associated with information collection requirements were identified and explained in the preamble to the NPRM published on March 14, 1996. This discussion appeared under the heading *Paperwork Reduction Act of 1995* (61 FR 10666).

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, the Secretary has determined that the benefits of the regulations justify the costs.

Summary of Potential Costs and Benefits

The potential costs and benefits of these final regulations are discussed elsewhere in this preamble under the following heading: Analysis of Comments and Changes.

Paperwork Reduction Act of 1995

Sections 99.7 and 99.32 contain information collection requirements and have been approved by OMB under control number 1880–0508. Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number assigned to the collection of information in these final regulations is displayed at the end of the affected sections of the regulations.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed regulations and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Information, Privacy, Parents, Records, Reporting and recordkeeping requirements, Students.

Dated: September 18, 1996.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number does not apply.)

The Secretary amends Part 99 of Title 34 of the Code of Federal Regulations as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 continues to read as follows:

Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.1 is amended by removing paragraph (b), redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d), respectively, and by revising paragraph (a) to read as follows:

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency provides administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions.

* * * * *

§ 99.2 [Amended]

3. Section 99.2 is amended by removing the number "438" and adding, in its place, the number "444".

4. Section 99.3 is amended by removing in the definition of "Act" the number "438" and adding, in its place, the number "444" and by revising the definitions of "Disclosure" and "Record" to read as follows:

§ 99.3 What definitions apply to these regulations?

* * * * *

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

* * * * *

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

* * * * *

§ 99.6 [Removed and reserved]

5. Section 99.6 is removed and reserved.

6. Section 99.7 is revised to read as follows:

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g (e) and (f)).

7. Section 99.10 is amended by adding ", or SEA or its component" following the word "institution" in paragraphs (c) and (e) and by revising paragraphs (a), (b), and (d), and the authority citation to read as follows:

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

* * * * *

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

* * * * *

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

§ 99.12 [Amended]

8. Section 99.12 is amended by removing in paragraph (a) the commas after "inspect" and after "review" and by adding after the word "inspect" the word "and" and by revising the authority citation to read as follows:

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

§ 99.20 [Amended]

9. Section 99.20 is amended by removing in paragraph (a) the words "or other rights".

§ 99.21 [Amended]

10. Section 99.21 is amended by removing in paragraphs (a), (b)(1), introductory text, and (b)(2) the words "or other".

11. Section 99.31 is amended by redesignating paragraph (a)(6)(iii) as paragraph (a)(6)(iv), by adding a new paragraph (a)(6)(iii) and by revising paragraphs (a)(5)(i) and (a)(9) and the authority citation to read as follows:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) * * *

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

* * * * *

(6) * * *

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

* * * * *

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii) If the educational agency or institution initiates legal action against a parent or student and has complied with paragraph (a)(9)(ii) of this section, it may disclose the student's education records that are relevant to the action to the court without a court order or subpoena.

* * * * *

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b)(1), (b)(2), (b)(4)(B), and (f)).

12. Section 99.32 is amended by removing the word "or" following paragraph (d)(3), replacing the period at

the end of paragraph (d)(4) with a semicolon and adding the word "or" after the semicolon, adding a new paragraph (d)(5), and revising the authority citation to read as follows:

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

* * * * *

(d) * * *

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

13. Section 99.33 is amended by revising paragraphs (c) and (d) and by adding a new paragraph (e) to read as follows:

§ 99.33 What limitations apply to the redisclosure of information?

* * * * *

(c) Paragraph (a) of this section does not apply to disclosures made pursuant to court orders or lawfully issued subpoenas under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), or to disclosures to a parent or student under § 99.31(a)(12).

(d) Except for disclosures under § 99.31(a) (9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of § 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

§ 99.34 [Amended]

14. Section 99.34(a)(1)(ii) is amended by removing the word "policy" and adding, in its place, the words "annual notification".

15. Section 99.36 is amended by revising paragraph (b), adding paragraph (c) and revising the authority citation to read as follows:

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

* * * * *

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

16. A new § 99.38 is added to subpart D to read as follows:

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974 concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

§ 99.63 [Amended]

17. Section 99.63 is amended by removing the word "person" and adding, in its place, the words "parent or eligible student".

Appendix

(Note: This appendix will not be codified in the Code of Federal Regulations.)

Model Notification of Rights Under FERPA for Elementary and Secondary Institutions

The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age ("eligible students") certain rights with respect to the student's education records. They are:

(1) The right to inspect and review the student's education records within 45 days of the day the District receives a request for access.

Parents or eligible students should submit to the school principal [or appropriate school official] a written request that identifies the record(s) they wish to inspect. The principal will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.

(2) The right to request the amendment of the student's education records that the parent or eligible student believes are inaccurate or misleading.

Parents or eligible students may ask *Alpha School District* to amend a record that they believe is inaccurate or misleading. They should write the school principal, clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading.

If the District decides not to amend the record as requested by the parent or eligible student, the District will notify the parent or eligible student of the decision and advise them of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

One exception which permits disclosure without consent is disclosure to school officials with legitimate educational interests. A school official is a person employed by the District as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel); a person serving on the School Board; a person or company with whom the District has contracted to perform a special task (such as an attorney, auditor, medical consultant, or therapist); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

[Optional] Upon request, the District discloses education records without consent to officials of another school district in which a student seeks or intends to enroll. [Note: FERPA requires a school district to make a reasonable attempt to notify the student of the records request unless it states in its annual notification that it intends to forward records on request.]

(4) The right to file a complaint with the U.S. Department of Education concerning alleged failures by the District to comply with the requirements of FERPA. The name and address of the Office that administers FERPA is:

Family Policy Compliance Office, U.S.
Department of Education, 400 Maryland
Avenue, SW, Washington, DC 20202–4605

[Note: In addition, a school may want to include its directory information public notice, as required by § 99.37 of the regulations, with its annual notification of rights under FERPA.]

Model Notification of Rights Under FERPA for Postsecondary Institutions

The Family Educational Rights and Privacy Act (FERPA) affords students certain rights with respect to their education records. They are:

(1) The right to inspect and review the student's education records within 45 days of the day the University receives a request for access.

Students should submit to the registrar, dean, head of the academic department, or other appropriate official, written requests that identify the record(s) they wish to inspect. The University official will make arrangements for access and notify the student of the time and place where the records may be inspected. If the records are not maintained by the University official to whom the request was submitted, that official shall advise the student of the correct official to whom the request should be addressed.

(2) The right to request the amendment of the student's education records that the student believes are inaccurate or misleading.

Students may ask the University to amend a record that they believe is inaccurate or misleading. They should write the University official responsible for the record, clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading.

If the University decides not to amend the record as requested by the student, the University will notify the student of the decision and advise the student of his or her right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the student when notified of the right to a hearing.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

One exception which permits disclosure without consent is disclosure to school officials with legitimate educational interests. A school official is a person employed by the University in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the University has contracted (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

[Optional] Upon request, the University discloses education records without consent to officials of another school, upon request, in which a student seeks or intends to enroll. [Note: FERPA requires an institution to make a reasonable attempt to notify the student of the records request unless the institution states in its annual notification that it intends to forward records on request.]

(4) The right to file a complaint with the U.S. Department of Education concerning alleged failures by *State University* to comply with the requirements of FERPA. The name and address of the Office that administers FERPA is:

Family Policy Compliance Office, U.S.
Department of Education, 400 Maryland
Avenue, SW., Washington, DC, 20202-
4605

[Note: In addition, an institution may want to include its directory information public notice, as required by § 99.37 of the regulations, with its annual notification of rights under FERPA.]

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BILLING CODE 4000-01-P

(b) [Reserved]

Subpart D—Testing Procedures

§ 343.90 Dissolution and drug release testing.

(a) [Reserved]

(b) *Aspirin capsules.* Aspirin capsules must meet the dissolution standard for aspirin capsules as contained in the United States Pharmacopeia (USP) 23 at page 132.

(c) *Aspirin delayed-release capsules and aspirin delayed-release tablets.* Aspirin delayed-release capsules and aspirin delayed-release tablets must meet the drug release standard for aspirin delayed-release capsules and aspirin delayed-release tablets as contained in USP 23 at pages 133 and 136 respectively.

(d) *Aspirin tablets.* Aspirin tablets must meet the dissolution standard for aspirin tablets as contained in USP 23 at page 134.

(e) *Aspirin, alumina, and magnesia tablets.* Aspirin in combination with alumina and magnesia in a tablet dosage form must meet the dissolution standard for aspirin, alumina, and magnesia tablets as contained in USP 23 at page 138.

(f) *Aspirin, alumina, and magnesium oxide tablets.* Aspirin in combination with alumina, and magnesium oxide in a tablet dosage form must meet the dissolution standard for aspirin, alumina, and magnesium tablets as contained in USP 23 at page 139.

(g) *Aspirin effervescent tablets for oral solution.* Aspirin effervescent tablets for oral solution must meet the dissolution standard for aspirin effervescent tablets for oral solution as contained in USP 23 at page 137.

(h) *Buffered aspirin tablets.* Buffered aspirin tablets must meet the dissolution standard for buffered aspirin tablets as contained in USP 23 at page 135.

Dated: October 19, 1998.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 98-28519 Filed 10-21-98; 10:59 am]

BILLING CODE 4160-01-C

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 216

RIN 0790-AG42

Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense promulgates the rule addressing military recruiting and Reserve Officer Training Corps program access at institutions of higher education. This rule implements the National Defense Authorization Act for Fiscal Year 1995, the National Defense Authorization Act for Fiscal Year 1996, and the Omnibus Consolidated Appropriations Act, 1997 (the Acts).

The Acts state that no funds available under appropriations acts for any fiscal year for the Departments of Defense, Transportation (with respect to military recruiting), Labor, Health and Human Services, Education, and Related Agencies may be provided by contract or grant (including a grant of funds to be available for student aid) to a covered school that has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents, the Secretary of Defense from obtaining, for military recruiting purposes, entry to campuses, access to students on campuses, access to directory information on students, or that has an anti-ROTC policy.

EFFECTIVE DATE: March 29, 1997.

FOR FURTHER INFORMATION CONTACT: William J. Carr, (703) 697-8444.

SUPPLEMENTARY INFORMATION: On April 8, 1997 the Department of Defense published an interim rule to implement the Acts, and invited public comments by July 7, 1997 (62 FR 16691). Consistent with the Acts, the interim rule took effect on March 29, 1997. Public comments were received and appropriate adjustments were made as reflected in this final rule.

The Secretary is committed to establishing sound procedures to implement current statutes, while keeping the regulatory burden to the minimum necessary to carry out the congressional intent. To that end, the Department has finalized this rule in consultation with other Federal agencies, including the Departments of Education, Labor, Transportation, and Health and Human Services. Agencies affected by this rule will continue to coordinate as they implement its provisions.

This rule defines the criteria for determining whether an institution of higher education has a policy or practice prohibiting or preventing the Secretary of Defense from maintaining, establishing, or efficiently operating a Senior ROTC unit; or has a policy of denying military recruiting personnel entry to campuses, access to students on campuses, or access to directory information on students. The Acts establish that institutions of higher education having such policies or practices are ineligible for certain Federal funding.

The criterion of "efficiently operating a Senior ROTC unit" refers generally to an expectation that the ROTC Department would be treated on a par with other academic departments; as such, it would not be singled out for unreasonable actions that would impede access to students (and vice versa) or restrict its operations.

This rule also defines the procedures that would be followed in evaluating reports that a covered school has not met requirements defined in this rule. When a component of the Department of Defense (DOD Component) believes that policies or practices of an institution of higher education might require such an evaluation, that component is required to confirm the institution's policy in consultation with the institution. If that exchange suggests that the policy or practice could trigger a denial of funding, as required by the Acts, the supporting facts would be forwarded through Department of Defense channels to the decision authority, who is the Assistant Secretary of Defense for Force Management Policy (ASD(FMP)).

The Department of Defense received and considered comments relating to this rule. Those comments frequently related to the interplay between the Acts and Family Educational Rights and Privacy Act of 1974, as amended (FERPA), 20 U.S.C. 1232g. Commenters have inquired whether release of student information in response to a request from a military recruiter would violate FERPA. Commenters pointed out that "directory information" is a term of art under FERPA that triggers particular responsibilities of the institution regarding the confidentiality of student information. Depending on the policy of a particular institution, that term may not necessarily refer to the same information that may be requested by a military recruiter. Commenters also pointed out that FERPA provides a mandatory opportunity for a student to object to release of "directory information" designated by an institution, and questioned whether the same opportunity to object must be provided to a student if a request is received from a military recruiter.

In response to the basic question of whether providing information in response to a request from a military recruiter would violate FERPA, the Department of Education has informed the Department of Defense that it will not consider provision of responsive student information as required under the Acts and this rule to violate FERPA. Institutions must take care, however, to release only that information specifically required under the Acts and this rule.

The Department of Defense appreciates the comments received regarding possible confusion from the use of the term "directory information" in the interim rule. Because the term is not synonymous under FERPA or the Acts, and to avoid possible conflict or confusion, the final rule substitutes the term "student recruiting information" for "directory information" as that term was used in the interim rule.

Regarding the opportunity for a student to "opt-out" of or object to release of "directory information" under FERPA, the Department of Defense provides the following clarification. If an institution receives a request for student recruiting information, and that request seeks information that the institution has included in its definition of "directory information" that is releasable under FERPA, and a student has previously requested that the "directory information" not be disclosed to any third party, the Department of Defense agrees that information for that student will not be provided to the Department of Defense. If an institution declines to provide student recruiting information because a student has "opted-out" from the institution's policy of disclosing "directory information" under FERPA, the Department of Defense will not consider that institution to have denied access under the Acts. The Department of Defense will honor only those student "opt-outs" from the disclosure of directory information that are even-handedly applied to all prospective employers seeking information for recruiting purposes. The Department of Defense will also honor the "opt-out" in cases where the institution's "directory information" definition does not include all of the student recruiting information requested by the recruiter.

If an institution does not release all of the requested student recruiting information as part of its "directory information" policy under FERPA (or has a policy of disclosing no "directory information"), the institution must nevertheless honor the request from a military recruiter for student recruiting information on students who have not "opted-out", even if that information would not be available to the public under FERPA. Because this information is requested exclusively for military recruiting, a special opportunity for a student to decline the release of student recruiting information is not necessary or appropriate.

In carrying out their customary activities, DOD components must identify any institutions of higher education that, by policy or practice, denies military recruiting personnel entry to the campus(es) of those schools, access to their students, or access to student recruiting information. When repeated requests to schedule recruiting visits or to obtain student recruiting information are unsuccessful, the DOD component concerned must seek written confirmation of the school's present policy from the head of the covered school through a letter of inquiry, allowing 30 days for response. If written confirmation cannot be obtained, oral policy statements or attempts to obtain such statements from an appropriate official of the school shall be documented. A copy of the documentation shall be provided to the covered school, which shall be informed of its opportunity to forward clarifying comments to accompany the DOD component's submission to the ASD(FMP), and shall be provided 30 day to offer such clarifying comments. When that 30-day period has elapsed, the DOD component will forward the case for disposition.

Similarly, in carrying out their customary activities, DOD components also must identify any institutions of higher education that, by policy or practice, deny establishment, maintenance, or efficient operation of a unit of the Senior ROTC, or deny students permission to participate, or effectively prevent students from participating in a unit of the Senior ROTC at another institution of higher education. The DOD component concerned must seek written confirmation of the school's policy from the head of the covered school through a letter of inquiry, allowing 30 days for response. If written confirmation cannot be obtained, oral policy statements or attempts to obtain such statements from an appropriate official of the school shall be documented. A copy of the documentation shall be provided to the covered school, which shall be informed of its opportunity to forward clarifying comments to accompany the DOD component's submission to the ASD(FMP), and shall be provided 30 days to offer such clarifying comments. When that 30-day period has elapsed, the DOD component will forward the case for disposition.

The recommendation of the DOD component then must be reviewed by the Secretary of the Military Department concerned, or designee, who shall evaluate responses to the letter of inquiry and other such information obtained in accordance with this part, and submit to the ASD(FMP) the names and addresses of covered schools that are believed to be in violation of current law. Full documentation must be furnished to the ASD(FMP) for each such covered school, including the school's formal response to the letter of inquiry, documentation of any oral response, or evidence showing that attempts were made to obtain either written confirmation or an oral statement of the school's policies.

Following any determination by the ASD(FMP) that policies or practices of an institution of higher education require ineligibility for certain Federal funding, as required by the Acts, the ASD(FMP) shall:

- Disseminate to Federal entities affected by the decision, including the DoD components and the General Services Administration (GSA), the names of the affected institutions. The ASD(FMP) also shall notify the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives;
- Publish in the **Federal Register** each such determination, and publish in the **Federal Register** at least once every six months a list of all institutions currently determined to be ineligible for contracts and grants by reason of such determinations; and
- Inform the affected institution that its funding eligibility may be restored if the school provides sufficient new information to establish that the basis for the determination no longer exists.

This rule contains procedures under which funding may be restored. Not later than 45 days after receipt of a school's request to restore funding eligibility, the ASD(FMP) must determine whether the funding status of the covered school should be changed and notify the applicable school of that determination. Pursuant to that determination, entities of the Federal government affected by the decision, including the DoD components and the GSA, shall be notified of any change in funding status.

Other Matters

In the event of any determination of ineligibility by the ASD(FMP), the affected Federal agencies shall determine what funds provided by grant or contract to the covered school are affected and take appropriate action. As a result of this division of responsibility and the large number of Federal agencies affected, this rule does not detail what specific funds are affected by any determination of ineligibility.

The Department of Education has provided information on the impact of the Acts on the programs of student financial assistance under Title IV of the Higher Education Act of 1965, as amended, in a January 1998 "Dear Colleague Letter" (No. GEN–98–3). That letter is available by request by calling 800–4FEDAID, or through the Department of Education's website at "http://www.ed.gov/offices/OPE/announce/dcl/1998/".

The Secretary of Education has determined that funds under the Federal Pell Grant Program (Title IV, Part A, Subpart 1), the Federal Family Education Loan Program (Title IV, Part B), the Federal Direct Student Loan Program (Title IV, Part D), the William D. Ford Federal Direct Loan Program (Title IV, Part D), the State Student Incentive Grant Program (Title IV, Part A, Subpart 4), the Robert C. Byrd Honor Scholarship Program (Title IV, Part A, Subpart 6), and the National Early Intervention Scholarship ad Partnership (NEISP) Program (Title IV, Part A, Subpart 2) are not affected. States that receive NEISP Program grants may continue to award student scholarships to be utilized at institutions that have been determined to be ineligible by the DoD. States may not, however, award sub-grants or contracts for NEISP services to such institutions.

The Secretary of Education has determined that funds under the following programs are affected: the Federal Supplemental Educational Opportunity Grant Program (Title IV, Part A, Subpart 3), the Federal Work-Study Program (Title IV, Part C), and the Federal Perkins Loan Program (Title IV, Part E). Collectively referred to as the campus-based programs, these three programs depend on institutional applications for funding. Once funds are received, the institution determines which students will receive allotted funds, within statutory and regulatory guidelines. Thus, for the purposes of this rule, these funds are considered to be grants to the institution.

Executive Order 12866, "Regulatory Planning and Review"

It has been determined that this final rule is not a significant regulatory action for OMB review since the consequences outlined in Executive Order 12866 are not likely to occur, given the historically infrequent occurrence of denial of funding to institutions of higher education under this rule.

Pub. L. 96–354, "Regulatory Flexibility Act" (5 U.S.C. 601)

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities since recent history indicates that its provisions are not applicable to the vast majority of institutions of higher education.

Pub. L. 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

This final rule will not impose any additional reporting or record keeping requirements under the Paperwork Reduction Act.

List of Subjects in 32 CFR Part 216

Armed forces, Colleges and universities.

Accordingly, 32 CFR part 216 is revised to read as follows:

PART 216—MILITARY RECRUITING AND RESERVE OFFICER TRAINING CORPS PROGRAM ACCESS TO INSTITUTIONS OF HIGHER EDUCATION

Sec.

216.1 Purpose.
216.2 Applicability.
216.3 Definitions.
216.4 Policy.
216.5 Responsibilities.
216.6 Information requirements.
Appendix A of part 216—Military Recruiting Sample Letter of Inquiry
Appendix B of part 216—ROTC Sample Letter of Inquiry.

Authority: 10 U.S.C. 983.

§ 216.1 Purpose.

This part:

(a) Implements the National Defense Authorization Act of 1995 (108 Stat. 2663).

(b) Implements 10 U.S.C. 983, and

(c) Implements the Omnibus Consolidated Appropriations Act, 1997 (110 Stat. 3009).

(d) Updates policy and responsibilities relating to the management of covered schools that have a policy of either denying, or effectively preventing military recruiting personnel entry to their campuses, access to their students, or access to student recruiting information.

(e) Updates policy and responsibilities relating to the management of covered schools that have an anti-ROTC policy.

§ 216.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD components"). The policies herein also affect the Departments of Transportation, Labor, Health and Human Services, Education, and Related Agencies. The term "Military Services," as used herein, refers to the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard, including their Reserve or National Guard components. The term "Related Agencies," as used herein, refers to the Armed Forces Retirement Home, the Corporation for National and Community Service, the Corporation for Public Broadcasting, the Federal Mediation and Conciliation Service, the Federal Mine Safety and Health Review Commission, the National Commission on Libraries and Information Science, the National Council on Disability, the National Education Goals Panel, the National Labor Relations Board, the National Mediation Board, the Occupational Safety and Health Review Commission, the Physician Payment Review Commission, the Prospective payment Assessment Commission, the Social Security Administration, the Railroad Retirement Board and the United States Institute of Peace.

§ 216.3 Definitions.

(a) *Anti-ROTC policy.* A policy or practice whereby a covered school prohibits or in effect prevents the Secretary of Defense from maintaining, establishing, or efficiently operating a unit of the Senior ROTC at the covered school, or prohibits or in effect prevents a student at the covered school from enrolling in a Senior ROTC unit at another institution of higher education.

(b) *Covered school.* An institution of higher education, or a subelement of an institution of higher education, subject to the following clarifications:

(1) In the event of a determination (§ 216.5) affecting only a subelement of a parent institution (see § 216.3(d)), the limitations on the use of funds (§ 216.4(a) and (b)) shall apply only to the subelement and not to the parent institution as a whole.

(2) The limitations on the use of funds (§ 216.4(a) and (b)) shall not apply to any individual institution of higher

education that is part of a single university system if that individual institution does not prevent entry to campus, access to students, or access to student recruiting information by military recruiters, or have an anti-ROTC policy, even though another campus of the same system is affected by a determination under § 216.5(a).

(c) *Student recruiting information.* For those currently enrolled, the student's name, address, telephone listing, age (or year of birth), level of education (e.g., freshman, sophomore, or degree awarded for a recent graduate), and major.

(d) *Institution of higher education.* A domestic college, university, or other institution (or subelement thereof) providing postsecondary school courses of study, including foreign campuses of such domestic institutions. The term includes junior colleges, community colleges, and institutions providing courses leading to undergraduate and post-graduate degrees. The term does not include entities that operate exclusively outside the United States, its territories, and possessions. A *subelement* of an institution of higher education is a discrete (although not necessarily autonomous) organizational entity that may establish policies or practices affecting military recruiting and related actions (e.g., an undergraduate school, a law school, a medical school, or other graduate schools). For example, the School of Law of XYZ University is a subelement of its *parent* institution (XYZ University).

(e) *Student.* An individual who is 17 years of age or older and is enrolled at a covered school.

(f) *Enrolled.* Registered for a least one credit hour of academic credit at the covered school during the most-recent, current, or next term.

(g) *Military recruiters.* Personnel of DoD whose current assignment or detail is to a recruiting activity of the DoD.

(h) *Pacifism.* Opposition to war or violence, demonstrated by refusal to participate in military service.

§ 216.4 Policy.

It is policy that:

(a) Under 108 Stat. 2663 and 110 Stat. 3009, no funds available under appropriations acts for any fiscal year for the Departments of Defense, Transportation (with respect to military recruiting), Labor, Health and Human and Human Services, Education, and Related Agencies may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered school if the Secretary of Defense determines that the covered school has a policy or practice (regardless of when implemented) that either prohibits or in effect prevents the Secretary of Defense from obtaining, for military recruiting purposes, entry to campuses, access to students on campuses, or access to directory information on students (student recruiting information).

(b) Under 110 Stat. 3009, no funds available under appropriations acts for any fiscal year for the Departments of Labor, Health and Human Services, Education, and Related Agencies may be provided by contract or grant (including a grant of funds to be available for student aid) to a covered school that has an anti-ROTC policy or practice (regardless of when implemented). Additionally, under 10 U.S.C. 983, no funds appropriated or otherwise available to the Department of Defense may be made obligated by contract or by grant to a covered school that has such a policy or practice.

(c) The limitations established in paragraph (a) of this section, shall not apply to a covered school if the Secretary of Defense determines that the covered school:

(1) Has ceased the policies or practices defined in paragraph (a) of this section;

(2) Has a long-standing policy of pacifism based on historical religious affiliation;

(3) When not providing requested access to campuses or to students on campus, certifies that all employers are similarly excluded from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers;

(4) When not providing any student recruiting information, certifies that such information is not maintained by the covered school; or that such information already has been provided to the Military Service concerned for that current semester, trimester, quarter, or other academic term, or within the past four months (for institutions without academic terms);

(5) When not providing student recruiting information for specific students, certifies that each student concerned has formally requested the covered school to withhold this information from third parties;

(6) Permits employers to recruit on the premises of the covered school only in response to an expression of student interest, and the covered school;

(i) Provides the Military Services with the same opportunities to inform the students of military recruiting activities as are available to other employers; or

(ii) Certifies that too few students have expressed an interest to warrant accommodating military recruiters, applying the same criteria that are applicable to other employers; or

(7) Is prohibited by the law of any State, or by the order of any State court, from allowing Federal military recruiting on campus. Such exemption does not apply to funds available to the Department of Defense, in accordance with 108 Stat. 2663.

Note: This exemption terminated effective March 29, 1998, in accordance with 110 Stat. 3009.

(d) The limitations established in paragraph (b) of this section, shall not apply to a covered school if the Secretary of Defense determines that the covered school:

(1) Has ceased the policies or practices defined in paragraph (b) of this section;

(2) Has a long-standing policy of pacifism based on historical religious affiliation;

(3) Is prohibited by the law of any State, or by the order of any State court, from allowing Senior Reserve Officer Training Corps activities on campus. Such exemption does not apply to funds available to the Department of Defense, in accordance with 10 U.S.C. 983.

Note: This exemption terminated effective March 29, 1998, in accordance with 110 Stat. 3009.

(e) A covered school may charge for actual costs incurred in providing military recruiters access to student recruiting information, provided such charges are reasonable and customary; in this case, the school must explain to the military recruiter, within 15 days of a request by the recruiter, its method for determining costs, and its basis for concluding that such charges are reasonable and customary.

(f) An evaluation to determine whether a covered school maintains a policy or practice covered by paragraph (a) of this section shall be undertaken when:

(1) Military recruiting personnel cannot gain entry to campus, cannot obtain access to students on campus, or are denied access to student recruiting information (however, military recruiting personnel shall accommodate a covered school's reasonable preferences as to times and places for scheduling on-campus recruiting, to the same extent such preferences are applicable to employers, generally);

(2) The costs being charged by the school for providing student recruiting information are believed by the military recruiter to be excessive, and the school does not provide information sufficient

to support a conclusion that such charges are reasonable and customary; or

(3) The covered school is unwilling to declare in writing, in response to an inquiry from a DoD component, that the covered school does not have a policy or practice of denying, and that it does not effectively prevent, the Secretary of Defense from obtaining for military recruiting purposes entry to campuses, access to students on campuses, or access to student recruiting information.

(g) An evaluation to determine whether a covered school has an anti-ROTC policy covered by paragraph (b) of this section shall be undertaken when:

(1) A Secretary of a Military Department of designee cannot obtain permission to establish, maintain, or efficiently operate a unit of the Senior ROTC; or

(2) Absent a Senior ROTC unit at the covered school, students cannot obtain permission from a covered school to participate, or are effectively prevented from participating, in a unit of the Senior ROTC at another institution of higher education.

§ 216.5 Responsibilities.

(a) The Assistant Secretary of Defense for Force Management Policy, under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Not later than 45 days after receipt of the information described in paragraph (b)(3) of this section:

(i) Make a final determination under 108 Stat. 2663, 10 U.S.C., section 983; and 110 Stat. 3009 and/or this part, and notify any affected school of that determination along with the basis, and that it is therefore ineligible to receive prescribed funds as a result of that determination.

(ii) Disseminate to Federal agencies affected by 110 Stat. 3009, to the DoD components, and to the General Services Administration (GSA) the names of covered schools identified under paragraph (a)(1)(i) of this section, and the basis of the determination.

(iii) Disseminate the names of covered schools identified under paragraph (a)(1)(i) of this section, to the Secretary of Education and to the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives.

(iv) Inform the applicable school identified under paragraph (a)(1)(i) of this section, that its funding eligibility may be restored if the school provides sufficient new information that the basis for the determination under paragraph (a)(1)(i) of this section no longer exists.

(2) Not later than 45 days after receipt of a covered school's request to restore its eligibility:

(i) Determine whether the funding status of the covered school should be changed, and notify the applicable school of that determination.

(ii) Notify the parties reflected in paragraphs (a)(1)(ii) and (iii) of this section when a determination of funding ineligibility (paragraph (a)(1)(i) of this section) has been rescinded.

(3) Publish in the **Federal Register** each determination of the Assistant Secretary of Defense for Force Management Policy that a covered school is ineligible for contracts and grants made under 108 Stat. 2663, 10 U.S.C., section 983, and 110 Stat. 3009 and/or this part.

(4) Publish in the **Federal Register** at least once every six months a list of covered schools that are ineligible for contracts and grants by reason of a determination of the Secretary of Defense under 108 Stat. 2663, 10 U.S.C., section 983, and 110 Stat. 3009 and/or this part.

(b) The Secretaries of the Military Departments shall:

(1) Identify covered schools that, by policy or practice, deny military recruiting personnel entry to the campus(es) of those schools, access to their students, or access to student recruiting information.

(i) When requests by military recruiters to schedule recruiting visits or to obtain student recruiting information are unsuccessful, the Military Service concerned shall seek written confirmation of the school's present policy from the head of the school through a letter of inquiry. A letter similar to that shown in appendix A of this part shall be used, but it should be tailored to the situation presented. If written confirmation cannot be obtained, oral policy statements or attempts to obtain such statements from an appropriate official of the school shall be documented. A copy of the documentation shall be provided to the covered school, which shall be informed of its opportunity to forward clarifying comments to accompany the submission to the ASD(FMP), and shall be provided 30 days to offer such clarifying comments.

(ii) When a request for student recruiting information is not fulfilled within a reasonable period, normally 30 days, a letter similar to that shown in appendix A of this part shall be used to communicate the problem to the school, and the inquiry shall be managed as described in § 216.5.(b)(1)(i). Schools may stipulate that requests for student recruiting information shall be in writing.

(2) Identify covered schools that, by policy or practice, deny establishment, maintenance, or efficient operation of a unit of the Senior ROTC, or deny students permission to participate, or effectively prevent students from participating in a unit of the Senior ROTC at another institution of higher education. The Military Service concerned shall seek written confirmation of the school's policy from the head of the school through a letter of inquiry. A letter similar to that shown in appendix B of this part shall be used, but it should be tailored to the situation presented. If written confirmation cannot be obtained, oral policy statements or attempts to obtain such statements from an appropriate official of the school shall be documented. A copy of the documentation shall be provided to the covered school, which shall be informed of its opportunity to forward clarifying comments to accompany the submission to the ASD(FMP), and shall be provided 30 days to offer such clarifying comments.

(3) Evaluate responses to the letter of inquiry, and other such evidence obtained in accordance with this part, and submit to the ASD(FMP) the names and addresses of covered schools that are believed to be in violation of policies established in § 216.4. Full documentation shall be furnished to the ASD(FMP) for each such covered school, including the school's formal response to the letter of inquiry, documentation of any oral response, or evidence showing that attempts were made to obtain either written confirmation or an oral statement of the school's policies.

(c) The Heads of the DoD components shall:

(1) Provide the ASD(FMP) with the names and addresses of covered schools identified as a result of evaluation(s) required under §§ 216.4(f) and (g).

(2) Take immediate action to deny obligations of DoD Funds to covered schools identified under paragraph (a)(1)(i) of this section, and to restore eligibility of covered schools identified under paragraph (a)(2) of this section.

§ 216.6 Information requirements.

The information requirements identified at §§ 216.5 (b) and (c)(1) have been assigned Report Control Symbol P&R-(AR)-2038 in accordance with DoD 8910.1-M.[1]

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[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

Appendix A of Part 216—Military Recruiting Sample Letter of Inquiry

(Tailor letter to situation presented)

Dr. John Doe
President
ABC College
Anywhere, USA 12345-9876

Dear Dr. Doe: I understand that military recruiting personnel (are unable to recruit on the campus of ABC College) (have been refused student recruiting information[1] on ABC College students for the purpose of military recruiting) by a policy or practice of the College. Current law[2] prohibits funds by grant or contract (includng a grant of funds to be available for student aid) from appropriations of the Departments of Defense, Transportation (with respect to military recruiting), Labor, Health and Human Services, Education, and Related Agencies to schools that have a policy or practice of denying military recruiting personnel entry to campuses, access to students on campuses, or access to student recruiting information. Implementing regulations are codified at 32 Code of Federal Regulations, part 216.

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of ABC College. In that regard, I request, within the next 30 days, a written policy statement of the institution with respect to access to campus and students, and to student recruiting information by military recruiting personnel.

Your response should highlight any difference between access for military recruiters and access for recruiting by other potential employers.

Based on this information, Department of Defense officials will make a determination as to your institution's eligiblity to receive funds by grant or contract. That decision may affect eligiblity for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and Related Agencies. Should it be determined that ABC College is in violation of the aforementioned statutes, such funding would be stopped, and the school would be ineligible to receive such funds in the future.

I regret that this action may have to be taken. Successful recruiting requires that Department of Defense recruiters have reasonable access to students on the campuses of colleges and universities, and at the same time have effective relationships with the officials and student bodies of those institutions. I hope it will be possible to (define the correction to the aforementioned problem area(s). I am available to answer any questions.

Sincerely,

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[1] Student recruiting information refers to a student's name, address, telephone listing, age (or year or birth), level of education (e.g., freshman, sophomore, or degree awarded for a recent graduate), and major.

[2] 108 Stat. 2663 and 110 Stat. 3009.

Appendix B of Part 216—ROTC Sample Letter of Inquiry

(Tailor Letter to Situation Presented)

Dr. Jane Smith
President
ABC College
Anywhere, USA 12345-9876

Dear Dr. Smith: I understand that ABC College has (refused a request from a Military Department to establish a Senior ROTC unit at your institution) (refused to continue existing ROTC programs at your institution) (prevented students from participation at a Senior ROTC program at another institution) by a policy or practice of the College. Current law[1] prohibits funds by grant or contract (including a grant of funds to be available for student aid) from appropriations of the Departments of Defense, Labor, Health and Human Services, Education, and Related Agencies to schools that have a policy or practice prohibiting or preventing the Secretary of Defense from maintaining, establishing, or efficiently operating a Senior ROTC unit. Those statutes also bar agency funds for schools that prohibit or prevent a student from enrolling in an ROTC unit at another institution of higher education. Implementing regulations are codified at 32 Code of Federal Regulations, part 216.

This letter provides you an opportunity to clarify your institution's policy regarding ROTC access on the campus of ABC College. In that regard, I request, within the next 30 days, a written statement of the institution with respect to (define the problem area(s)).

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. The decision may affect eligibility for funding from appropriations of the Departments of Defense, Labor, Health and Human Services, Education, and Related Agencies. Should it be determined that ABC College is in violation of the aforementioned statutes, such funding would be stopped, and the school would be ineligible to receive such funds in the future.

I regret that this action may have to be taken. Successful officer procurement requires that the Department of Defense maintain a strong ROTC program. I hope it will be possible to (define the correction to the aforementioned problem area(s)). I am available to answer any questions.

Sincerely,

Dated: October 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98-28413 Filed 10-22-98; 8:45 am]

BILLING CODE 5000-04-M

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[1] 10 U.S.C. 983 and 110 Stat. 3009.

DEPARTMENT OF EDUCATION

34 CFR Part 99

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The amendments are needed to implement sections 951 and 952 of the Higher Education Amendments of 1998 (HEA), and to clarify several existing provisions.

DATES: Comments must be received by the Department on or before August 2 1999.

ADDRESSES: All comments concerning these proposed regulations should be addressed to LeRoy Rooker, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202-4605. Comments may also be sent through the Internet to FERPA__Comments@ED.Gov.

FOR FURTHER INFORMATION CONTACT: Ellen Campbell, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202-4605. Telephone: (202) 260-3887.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange comments in the same order as the proposed regulations.

The Secretary particularly requests comments from institutions of postsecondary education on whether the new regulatory definitions of "crime of violence," and "final results" under §99.39 are sufficiently clear and provide adequate guidance in interpreting and applying the statutory amendment.

The Secretary also particularly requests comments on whether the provision concerning the nonconsensual disclosure of information to parents and guardians under §99.31(a)(14) is sufficiently clear and whether it provides adequate guidance on this new permissible disclosure.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 2W113, FB-6, 400 Maryland Avenue, SW., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

On request the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205-8113 or (202) 260-9895. An individual who uses a TDD may call the Federal Information Relay Service at 1-800-877-8339.

To assist the Department in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

Background

These proposed regulations have been reviewed and revised in accordance with the Department's "Principles for Regulating," which were developed to ensure that the Department regulates in the most flexible, most equitable, and least burdensome way possible. These principles advance the regulatory reinvention and customer service objectives of the Administration's National Partnership for Reinventing Government and are essential to an effective partnership with States and localities. The Secretary proposes these regulations and believes they are necessary to implement the law and give the greatest flexibility to local governments and schools. In addition, the regulations minimize burden while protecting parents' and students' rights.

Summary of Major Provisions

The following is a summary of the regulatory provisions the Secretary proposes as necessary to implement the statute (Pub. L. 105-244, effective October 1, 1998), such as interpretations of statutory text or standards and procedures for the operation of the program. Some of the provisions merely restate statutory language.

The Secretary is not authorized to change statutory requirements. Commenters are requested to direct their comments to the regulatory provisions that would implement the statute.

1. Section 99.1 Applicability

FERPA applies to educational agencies and institutions to which funds are made available under any program which is administered by the Secretary. The proposed clarification of the term "educational agency" is necessary because the phrase "performs service functions for" causes confusion with the public. This revision clarifies that FERPA generally applies to educational agencies that have direct administrative responsibilities for the educational services provided by public elementary and secondary schools or by postsecondary institutions.

2. Section 99.3 Definitions

The Secretary proposes to amend the definition of the term "directory information" by adding additional items that may be designated by an educational agency or institution as "directory information" and to clarify the meaning of "dates of attendance." The term "dates of attendance" is intended to refer to the period of time during which an individual attended or was enrolled in an educational agency or institution and not to a student's daily attendance record.

The Secretary also proposes to clarify the definition of sole possession records. The Secretary proposes to provide more detailed guidance on the definition because there has been confusion over the term. Sole possession records are memory aids or reference tools that do not contain information taken directly from a student or records that are used to make decisions about the student.

3. Section 99.5 Rights of Students

The Secretary proposes to provide additional guidance regarding the requirement that a student attending one component of an educational agency or institution does not have rights under FERPA with respect to other components of the same agency or institution to which the individual has applied for admission. This clarification restates §99.5(c) in a more direct manner in order to explain that an individual who is or has been a student at an agency or institution and who has been rejected for admission by a component of that agency or institution does not have rights under FERPA with respect to that application for admission.

4. Section 99.31(a)(3) Prior Consent Not Required for Disclosure to Attorney General of the United States

The proposed regulations implement a new statutory provision that permits the disclosure of education records to authorized representatives of the Attorney General of the United States for law enforcement purposes without specific consent of the student.

5. Section 99.31(a)(8) Prior Consent Not Required for Disclosures to Parents of a Dependent Student

The Secretary clarifies that educational agencies and institutions may disclose education records to the parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986, without the student's consent. An educational agency or institution may disclose education records to either parent of a dependent student, regardless of which parent claims the student as a dependent.

6. Section 99.31(a)(9)(iv) Prior Consent Not Required for Disclosures That Are Necessary for the Educational Agency or Institution To Defend Itself

A new regulatory provision states that FERPA permits an educational agency or institution to release education records to a court, without a parent's or an eligible student's prior written consent and without a court order or lawfully issued subpoena, if the parent or eligible student has initiated legal action against the school. The disclosure is limited to those records that are necessary for the agency or institution to defend itself in court.

7. Section 99.31(a)(13) and § 99.39 Disclosure of Final Results of Certain Disciplinary Proceedings

The HEA amended the statute to allow a postsecondary institution to disclose the final results of any disciplinary proceeding conducted by the institution against a student who is an alleged perpetrator of a crime of violence if the institution determines, as a result of the proceeding, that the student committed a violation of the institution's rules or policies with regard to that crime.

A new section (§ 99.39) provides guidance to institutions regarding this change, and lists the applicable definitions. The Secretary particularly welcomes comment on this provision.

8. Section 99.31(a)(14) Prior Consent Not Required for Disclosures to Parents and Legal Guardians Regarding Violations of Alcohol or Drug Laws or Rules

The HEA amended the statute to permit postsecondary institutions to disclose to parents and legal guardians of students under the age of 21, without the student's consent, information regarding the student's violation of any Federal, State, or local law, or any rule or policy of the institution governing the use or possession of alcohol or a controlled substance.

In addition to this new provision, the statute already provides that postsecondary institutions may disclose certain information from a student's education records to parents or legal guardians under several exceptions to the prior consent rule. Under § 99.31(a)(8) of the regulations, institutions may release information to parents or guardians, without the student's consent, if the student is a dependent for tax purposes. Also, under § 99.31(a)(10), an institution may release information to a parent or guardian in connection with a health or safety emergency. This provision adds a new exception to the prior consent requirement of FERPA.

Clarity of the Regulations

Executive Order 12866 and the President's Memorandum of June 1, 1998 on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 99.31.)
- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the ADDRESSES section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds from the Department and certain 4- and 2-year colleges and for-profit postsecondary trade and technical schools with small enrollments that receive federal funds, such as student aid programs under Title IV of the Higher Education Act of 1965. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure that LEAs comply with the educational privacy protection requirements in FERPA.

Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
http://www.ed.gov/news.html

To use the PDF you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, D.C., area at (202) 512–1530.

Note: The official version of this documen is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO

Access at: http://www.access.gpo.gov/nara/index.html

(Catalog of Federal Domestic Assistance Number does not apply)

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Information, Privacy, Parents, Records, Reporting and recordkeeping requirements, Students.

Dated: May 25, 1999.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend part 99 of title 34 of the Code of Federal Regulations as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 continues to read as follows:

Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.1 is amended by revising paragraph (a)(2) to read as follows:

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) * * *

(2) The educational agency provides administrative control of or direction of public elementary or secondary schools or by postsecondary institutions.

3. Section 99.3 is amended by revising the definition of "Directory information", and by revising paragraphs (b) introductory text and (b)(1) under the definition of "Education records" to read as follows:

§ 99.3 What definitions apply to these regulations?

* * * * *

Directory information. (a)(1) The term means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, photograph, degrees, honors and awards received, and the most recent educational agency or institution attended.

(2)(i) "Dates of attendance" refers to the general periods of time during which an individual attended or was enrolled in an educational agency or institution. Examples of "dates of attendance" include an academic year, a spring semester, or a first quarter.

(ii) The term "dates of attendance" does not include daily specific records of a student's attendance at an educational agency or institution. A student's attendance record is not "directory information" and may not be disclosed without consent under FERPA.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

* * * * *

Education records.

* * * * *

(b) The term does not include—

(1) Records that are kept in the sole possession of the maker of the record—often called sole possession records—that are not used for purposes other than a memory or reference tool, that are not accessible or revealed to any other person except a temporary substitute for the maker of the record, and that are typically maintained by the school official unbeknownst to other individuals. Records that contain information taken directly from a student or that are used to make decisions about the student are not sole possession records.

* * * * *

4. Section 99.5 is amended by revising paragraph (c) to read as follows:

§ 99.5 What are the rights of students?

* * * * *

(c) An individual who is or has been a student at an educational agency or institution and who has been rejected for admission by a component of that educational agency or institution does not have rights under this part with respect to records collected and maintained in connection with consideration of that application for admission.

5. Section 99.31 is amended by revising paragraph (a)(3), revising paragraph (a)(8), adding paragraph (a)(9)(iv), revising paragraph (a)(13), adding a new paragraph (a)(14), and revising paragraph (b) to read as follows:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) * * *

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States (for law enforcement purposes);

(iii) The Secretary; or

(iv) State and local educational authorities.

* * * * *

(8)(i) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(ii) The educational agency or institution may disclose information under paragraph (a)(8)(i) of this section to either parent of a dependent student, regardless of which parent claims the student as a dependent.

* * * * *

(9) * * *

(iv) If a parent or eligible student initiates legal action against the educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are necessary for the educational agency or institution to defend itself.

* * * * *

(13) The disclosure is in connection with a disciplinary proceeding conducted by an institution of postsecondary education against a student who is an alleged perpetrator of a crime of violence subject to § 99.39.

(14)(i) The disclosure is to a parent or a legal guardian of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The student is under the age of 21; and

(B) The institution determines that the student has committed a disciplinary violation with respect to that use or possession.

(ii) Paragraph (a)(14)(i) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from making the disclosure permitted in this section.

(b) This section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11) and (13) through (14) of this section.

6. A new § 99.39 is added to read as follows:

§ 99.39 What conditions apply to disclosure of records pertaining to disciplinary proceedings?

(a) An institution of postsecondary education may disclose the final results of a disciplinary proceeding conducted by the institution concerning an allegation of a crime of violence against a student who is an alleged perpetrator of a crime of violence, without the prior written consent of the student, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to that crime.

(b) As used in this part:

Crime of violence, as that term is defined in section 16 of title 18, United States Code, means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. It includes, but is not limited to, the following offenses: criminal homicide, forcible sex offense, robbery, aggravated assault, and arson, as these terms are defined in appendix E to 34 CFR part 668, as well as burglary of an occupied structure or dwelling and kidnaping.

Final results means only the name of the student charged, the violation committed, and any sanction imposed by the institution on the student.

(c) The institution must not disclose the name of any other student, such as a victim or witness, without the prior written consent of that other student.

(d) This section applies to disclosures made or to requests received by an institution of postsecondary education on or after October 1, 1998.

7. Section 99.63 is revised to read as follows:

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, 400 Maryland Avenue, SW, Washington, D.C. 20202–4605.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 [Revised]

8. Section 99.64(d) is removed and reserved.

[FR Doc. 99–13853 Filed 5–28–99; 8:45 am]

BILLING CODE 4000–01–P

C. INTERPRETIVE MATERIALS

1. Interview with LeRoy Rooker, 10 *Synthesis: Law and Policy in Higher Education* 716 (1998).

2. Technical Assistance Letters from the U.S. Department of Education's Family Policy Compliance Office.

LeRoy Rooker on

FERPA as a defender of education and privacy rights on today's college campuses

Interview by John Lowery

LeRoy Rooker is Director of the Family Policy Compliance Office for the U.S. Department of Education.

SYNTHESIS: What is FERPA designed to accomplish? How well has it achieved that goal?

ROOKER: Congress enacted the Family Educational Rights and Privacy Act (FERPA) in 1974 during a period of time when the country was focused on privacy issues. When Senator James Buckley of New York first introduced FERPA, he noted some very interesting things:

> [A]s more stories come out in the media about the abuses of personal data by schools and Government agencies, the public and Congress have become increasingly aware of the problems such abuses pose . . . It is appropriate, therefore, that we take this opportunity to protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federal assisted educational activities.

The law was not legislation that was crafted and deliberated by a committee but was offered on the Senate floor with bipartisan support. Since 1974, FERPA has been amended seven times. Additional amendments are possible in the Higher Education Reauthorization Act, which Congress is working on now. [*Editor's note:* FERPA has again been amended by Congress].

The law has worked well and, I think, very much has achieved the goal that Senator Buckley, his co-sponsor Senator Claiborne Pell, and others envisioned in 1974. While there are abuses, on the whole, school officials seem to be very aware of parents' and students' privacy rights. If the inquiries and requests for technical assistance that our office receives are any indication, there is an acute awareness of the need to comply with FERPA and to respect privacy rights. We have consistently found that schools want to comply with FERPA. They just need to have proper training.

SYNTHESIS: A number of institutions have recently adopted policies concerning parental notification when students are involved in incidents involving alcohol and other violations of the code of student conduct. What is the Family Policy Compliance Office's position concerning these policies?

ROOKER: FERPA was written to allow postsecondary schools to disclose, without a student's consent, information from the student's education records to his or her parents if that student is a dependent for tax purposes. FPCO has worked with colleges and universities on developing such a policy. However, the disclosure is permissive; institutions are not required by FERPA to provide information to parents.

Although parents have rights under FERPA when their children are minors and in elementary or secondary school, once the student enters a postsecondary institution, the rights under FERPA transfer to the student. Some institutions, like those more urban schools that have a lot of older adult students, don't bother with trying to figure out who is a dependent for tax purposes and who is not. Other schools with a more traditional student body opt to develop an open policy at registration time that clearly lays out its intention of involving parents.

Congress is considering a change to FERPA that would allow institutions to contact a student's parents if he or she violated the code with regard to alcohol or drugs, even if the student is not a dependent for tax purposes. [*Editor's note:* the change has now become law].

SYNTHESIS: On a related note, how should institutions determine whether students are dependent for tax purposes when sharing information with parents?

ROOKER: While FERPA does not offer guidance on what may be considered adequate documentation of a student's status as a dependent, we have said that a policy of documenting a student's dependency status by requiring a parent seeking access to records to supply a copy of his or her most recent Federal income tax form is acceptable.

We've also said that nothing in FERPA would preclude a school from requiring students to identify their status at the time of registration or even application for incoming freshmen and transfer students. If a school decides to adopt such a requirement, we believe that students should be advised of the reason why they are asked about their tax status as dependents and suggest a statement similar to this:

> Under FERPA, the University may disclose to parents information from the education records of a student who is "dependent" under the Federal tax laws without the student's consent. Have you been claimed by your parents as a dependent for Federal tax purposes?

Thereafter, if a parent were to request access to information from a student's education records and those records have been identified as the records of a *non-dependent student,* the record custodian could then ask that the parent supply a copy of his or her most recent Federal income tax form before access to those records would be given.

In this way, the burden on a school of obtaining proof of a student's dependent status from a parent would be removed in many instances and schools could more readily distinguish those students who are dependent students from those who are not.

SYNTHESIS: Recently, the Family Policy Compliance Office has articulated the concept of "implied consent" in cases when a student seeks the intervention of an outside body in a dispute with the institution. Can you explain what is meant by implied consent and its limitations?

ROOKER: Nothing in FERPA specifically permits an educational agency or institution to infer an implied waiver of the right to consent. However, in the most recent regulations amending FERPA, which were published in the Federal Register on November 21, 1996, we noted that the FPCO had adopted a policy of permitting a school to infer an implied waiver of the right to consent to disclosures of information from education records if the parent or student has sued the institution.

This policy is based on the premise that FERPA was not intended to permit a student or parent to use rights afforded them under FERPA to prevent an educational agency or institution from defending itself in a court of law when the parent or student has initiated legal action and seeks damages against the agency or institution. In such circumstances, the educational agency or institution must be able to defend itself.

We have maintained a consistent position on this issue and advise institutions that any disclosure of personally identifiable information from a student's education records to a court of law in response to a lawsuit filed against the institution by the student must be limited to that information necessary to defend itself against the specific charges made.

We have extended that policy to permit schools to infer an implied waiver of the right to consent in other specific circumstances, which are based on a ***narrow set of facts present in a particular case***. Any educational agency or institution that faces a question about disclosure with respect to an implied waiver of the right to consent should contact the FPCO with details about the particular situation it is facing for guidance before it releases any education records. However, in general, here is the policy:

The Department will support an educational agency or institution that has inferred an implied waiver of the student's right to consent to disclosure when:

(1) the student has taken an adversarial position in writing against the educational agency or institution;

(2) the student has initiated the involvement of the third party by contacting that party in writing, and, in so doing:
   (a) set forth specific allegations against the educational agency or institution; and,
   (b) requested that action be taken against the educational agency or institution or that the third party assist the student in circumventing decisions made about the student by the educational agency or institution;

(3) the third party's special relationship with the educational agency or institution:
   (a) gives the third party authority to take specific action against the educational agency or institution; or,
   (b) reasonably could be significantly adversely affected if the educational agency or institution cannot refute the allegations; and

(4) the disclosure is as limited as is necessary for the educational agency or institution adequately to defend itself from the student's charges or complaint. Unless the third party is a court of law, it should follow the procedures set forth in 34 CFR § 99.33 on limitations that apply to the redisclosure of information derived from education records.

We believe this policy makes good common sense. An educational agency or institution should be able to defend itself against an adversarial position that has been taken by a student, especially if the student has shared this information in writing with a third party that could significantly adversely affect the educational agency or institution. The potential harm is the dissemination of personally identifiable information from education records without the appropriate written consent.

> "An educational agency or institution should be able to defend itself against an adversarial position that has been taken by a student . . ."

The above guidelines are our effort to minimize the harm, while at the same time to protect the strong policy consideration that gives rise to the doctrine of the waiver of [illegible] right to consent.

Examples of a "third party's special relationship with a school" include: an educational agency or institution's grantor/grantee relationships; an educational agency or institution's relationship with a State or federal legislator; or an educational agency or institution s relationship with a State or federal commission charged with looking into allegations made by a student. A "third party" cannot include the media or the general public.

SYNTHESIS: The Student Right-to-Know and Campus Security Act was amended in 1992 to require institutions to inform the victim of an alleged sexual assault of the final outcome of the campus disciplinary proceeding against the alleged perpetrator. What steps should the institution take in making this notification and what form should it take under FERPA?

ROOKER: FERPA was amended by Congress in 1990 to *permit* postsecondary institutions to disclose to the victim of an alleged crime of violence the results of a disciplinary proceeding brought against a student accused of the crime, without the prior consent of the accused. Under this 1992 amendment, disclosure is limited to the alleged victim, who should be informed that the information may not be disclosed to the public generally.

The institution should include a notice with the disclosed information that informs the alleged victim that the infor[illegible]tion provided to him or her is protected by FERPA.

SYNTHESIS: Are open disciplinary hearings permissible under FERPA? What conditions must be met to hold an open hearing?

ROOKER: FERPA would prohibit a school from having an open disciplinary hearing—unless the school obtains the written consent of all the students involved to disclose any and all information which might be released from their education records during the course of the hearing.

SYNTHESIS: When a student files a complaint against another student alleging a violation of the code of student conduct, should the complaint and transcripts of any subsequent hearing be viewed as the educational record of the accused student, the complainant, or both?

ROOKER: That depends. FERPA states that where a document contains information directly related to more than one student, a student has the right to inspect and review only the part that relates to him or her, or to be informed of the specific information contained in that part of the record.

Where information directly related to two or more students is inseparable, then each student may inspect and review all information directly related to the student, even if that information is also directly related to another student.

An example of a record that is "inseparable" would [illegible] sanction which contains an order that the student haras[illegible] stay physically away from the student-complainant. That information is "directly related" to the student-complainant who, therefore, has the right to

[continued on page 731]

LeRoy Rooker . . . *[from p. 717]*

inspect and review it. However, a sanction that pertains only to the student-harasser, such as a written reprimand, is not directly related to the student-complainant and, therefore, would not be disclosable to the complainant without consent under FERPA.

SYNTHESIS: Why did the Dept. of Education intervene in federal court to block implementation of an Ohio Supreme Court interpretation of FERPA ordering the release of disciplinary records under State open records laws?

ROOKER: In January, we asked a federal court to enjoin Miami University and Ohio State University from publicly releasing on-campus student disciplinary records containing the names of student victims and accused students as prohibited under FERPA. We filed suit in order to prevent irreparable harm to the students, especially victims and witnesses, who legitimately expect privacy and confidentiality in their school's on-campus disciplinary process.

> "We filed suit in order to prevent irreparable harm to the students, especially victims and witnesses, who legitimately expect privacy . . ."

SYNTHESIS: Wouldn't it be good public policy to allow press access to college student disciplinary cases? Why can't the Department of Education accommodate that goal?

ROOKER: Congress determines "public policy" through the enactment of laws. Our responsibility as part of the Executive Branch is to enforce the laws assigned to our agency. If Congress changes FERPA to allow disclosure of student disciplinary records, as it did with law enforcement unit records, then the Department would "accommodate that goal" by changing our regulations to reflect the legislative change and changing the way that we interpret the law.

SYNTHESIS: How is FERPA enforced? Is there a private cause of action?

ROOKER: The FPCO is designated by the Secretary to investigate, process, and review complaints and violations under FERPA and to provide technical assistance to educational agencies and institutions to ensure compliance with FERPA.

If a complaint is received that contains specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred, this Office initiates an investigation into that complaint according to the procedures outlined in the regulations.

If a determination is made that a school is in violation, the institution and the complainant are so advised and the school is informed of the measures to be taken to come into compliance with the law. The investigation remains open until voluntary compliance is achieved.

Before the FPCO is authorized to initiate an investigation into allegations of violations under FERPA, the regulations require that complaints received by this office:

(1) **contain specific allegations of fact** giving reasonable cause to believe that a violation of FERPA has occurred; and

(2) **be timely.** A complaint is considered timely if it is submitted to this Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

Within these guidelines, we administer a comprehensive Federal law that impacts every public elementary and secondary schools and virtually all public and private postsecondary institutions in the nation. As such, the FPCO works directly with the school district, or the postsecondary institution, against which a complaint has been filed in order to bring that agency or institution into compliance with FERPA.

The FPCO has various enforcement options when it finds that an educational agency or institution has not complied with FERPA, including issuance of a statement of the specific steps that the agency or institution must take to comply and providing a reasonable period of time during which the agency or institution may comply voluntarily. If, thereafter, the agency or institution fails to comply, the Secretary of Education may withhold further payments under any applicable program, issue a complaint to compel compliance through a cease and desist order, or terminate eligibility to receive funding.

The statute does not create a private cause of action under FERPA and in 1977 the 8th U.S. Circuit Court of Appeals ruled that there is no private cause of action under FERPA. See *Girardier v. Webster College,* 563 F.2d 1276, 1277 (1977). Most district courts have followed that decision.

However, the 2nd Circuit Court of Appeals, although not ruling on the issue of whether FERPA provides a private cause of action in itself, has ruled that FERPA does create rights that may be enforced by an individual in a private cause of action, based on title 42 of the United States Code, Section 1983. See *Fay v. South Colonie Central School District,* 802 F.2d 21, 33 (1986).

SYNTHESIS: Has the Department of Education ever cut off an institution's Federal funds for violating FERPA?

ROOKER: No. If, after our investigation, we determine that a FERPA violation has occurred, we work to bring the institution into voluntary compliance with FERPA. As I mentioned previously, schools want to comply with FERPA. Our experience has been that schools don't intentionally violate FERPA and, as such, they seek our help in correcting whatever it was that led to the violation. So far, we have always been able to achieve compliance in a voluntary manner.

I should add that most violations occur because of a lack of knowledge and training on how to be in compliance with FERPA. A few years ago, we began to offer compliance training to help train school officials and are currently working to put our decisions and letters of technical assistance on our Web site.

> ". . . most violations occur because of a lack of knowledge and training on how to be in compliance with FERPA."

SYNTHESIS: What are the most common questions sent to your office by university administrators? How does your office answer them?

ROOKER: Our office receives so many different questions, day after day, that it's hard to say what the most common ones are. However, I think some of the biggest challenges that we *all* are facing these days are the challenges that are related to computerized data and information sharing and e-mails and electronic access to records by students and faculty. Such concepts were not in the minds, I m sure, of Senators Buckley and Pell as they discussed the attributes of having a privacy law like FERPA. So we are constantly being pressed to try to balance the concept of privacy of education records and requests from institutions to share information with each other.

Sometimes it seems that the desire of institutions (and systems and States) to share information with each other is outweighing what some would consider the noble desire to safeguard information. We are trying to find that balance, while at the same time stay within the confines of what Congress has said.

SYNTHESIS: What are the key changes made in FERPA or the Department of Education regulations in recent years?

ROOKER: Probably the most significant change to FERPA came about in 1992 when Congress excluded from the definition of "education records" and, thus, from the restrictions and rights of access under FERPA, records that are maintained by a law enforcement unit of an educational agency or institution that were created by that unit for the purpose of law enforcement. Because of the increase of crime on and around school campuses and because safe campuses are a priority of this Department, this was a pivotal change. It freed up campus law enforcement officials who were previously, under the old language of the law, very restricted in the information they could disclose.

A change that we made in the regulations that was not based on a legislative change was the removal in 1996 of the former FERPA provision that required schools to have a student records policy. On several occasions, our office has looked for ways to reduce administrative burdens on schools where these burdens were regulatory and not statutory.

In 1994, Congress did make a clarification that notifications to parents and students of their rights under FERPA should be done "effectively." By removing the regulatory policy requirement and by enhancing the notification requirement under FERPA, we sought to relieve some of the administrative burdens on institutions, while at the same time provide students with a clearer understanding of their rights under FERPA. We believe this achieved the purpose of the directive issued by Congress.

SYNTHESIS: What are the most common FERPA violations and how can they be avoided?

ROOKER: The two most common FERPA violations are not providing a student with an opportunity to inspect and review his or her records (§ 99.10 of the FERPA regulations) and improper disclosure of information from student education records (§ 99.30).

With regard to a student's right to access his or her education records, school officials should remember that the term education records is very broad and includes practically any record that is directly related to a student and is maintained by the school or a party acting for the school.

Concerning improper disclosures, when school officials get a request or are thinking about disclosing information to an outside party, they should look at § 99.31 of the FERPA regulations and ask themselves if the disclosure fits one of the conditions under which information from education records can be disclosed without the student's consent. If it doesn't, they need to get the student's consent.

If a school officials needs guidance in these areas, they can always call the FPCO.

SYNTHESIS: Who should institutions contact if they have specific questions concerning the regulations for FERPA?

ROOKER:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-4605

Telephone: 202/260-3887; Fax: 202/260-9001

We have a special e-mail address that school officials can use to get informal responses to more routine questions. It's easy to remember—*FERPA@ED.Gov.*

Our web site address is:
www.ed.gov/offices/OM/fpco.html. ■

BEST COPY AVAILABLE

August 22, 1991

Mr. ____________
President
______________ University

Complaint No. _______
Family Educational Rights and
Privacy Act (FERPA)

Dear Mr. _________:

This is to inform you of the finding in the complaint filed with this Office by Mr. ________, an undergraduate student in ______ College. Mr. _______ alleged that the College denied him access to his education records in violation of the Family Educational Rights and Privacy Act (FERPA). Specifically, he alleged that the University denied him access to a summary sheet that was prepared by the Admissions Committee in connection with this application for admission to the University. This Office informed your predecessor, Dr. _________, of the allegation by letter dated May 13, 1991. By letter dated July 12, 1991, Ms. _______, attorney, responded on behalf of the University. Following is a discussion of the allegation, the University's response, and the results of our investigation.

In support of his allegation, Mr. ________ submitted a copy of a letter dated March 8, 1991, addressed to him by the director of admissions, Ms. ________, in which she informed Mr. _____ as follows:

> Let me explain how the College compiles a student's file. Once a student is admitted to the College, all admissions related documents not prepared by the Admissions Committee, such as the application itself and various recommendations, are placed in a folder which then becomes the student's file. It is sent to the Freshman Dean's Office, and later documents relating to the student are placed in it. It then will travel to the House where the student lives as an upperclassman, and similarly grows ans new materials are placed in it. The student has full access to this file, other than to confidential letters to which he or she has waived access. I understand that you reviewed this file, and presumably inspected all materials other than those to which you waived access.
>
> The summary sheets (which contain the readers' comments) that you request are prepared by and kept in the Admissions Office. Summary sheets are, of course, made before the students enroll; by the time they enroll, those records have no further significance to them. The summary sheets are therefore deliberately kept separate from the student files. [Emphasis added.]

> As you may know, the Buckley Amendment was enacted to ensure student access to educational records that the institution may use in making decisions that affect a student's future, and to give the student the opportunity to challenge and correct inaccurate information. Since the summary sheets have no significance to enrolled students, they are not documents for which the opportunity that the Buckley Amendment affords to challenge and correct information would be meaningful. We therefore have concluded that summary sheets are not covered by the Buckley Amendment. [Emphasis added.]
>
> Moreover, the summary sheet you request is heavily derivative of the confidential materials to which you waived access; indeed, it excerpts them directly. We therefore believe that [it] is also confidential and that we have no legal obligation to make it available to you. Indeed, we feel strongly that we have an obligation not to do so.

In his letter to this Office, Mr. ________ stated that he had waived his FERPA right of access to confidential letters of recommendation. However, with respect to the summary sheets, he stated:

> Even if the exemption for certain confidential recommendations is stretched to include information on application summary sheets, it does not follow that must deny students access to those sheets in their entirety. ________'s interpretation has the unacceptable result of allowing the university to exempt any document from FERPA simply by jotting down a margin note on it which contains something taken from a confidential recommendation.
>
> If necessary, ______ could redact derivative information from the summary sheets. Of course, this process would be fraught with danger because ________ would inevitably attempt to exaggerate the presence of derivative data. However, such a redaction would allow students to have access to the vast majority of summary sheet information, which has no relation to any recommendations.

In its response to the complaint the University confirms that it denied Mr. _______ access to the summary sheet. The University argues, however, that he denial of access does not violate FERPA because (1) the summary sheet is not "used by the institution in making decisions that affect the life of the student" (120 Cong. Rec. 39858-9 (1974)) and, therefore, does not fall within the scope of FERPA, and (2) the summary sheet is "heavily derivative of the teacher recommendation to which [Mr. ________] waived access [and if] ________ were to release Mr. ________'s sheet to him, it would in effect be releasing parts of those confidential recommendations [a result which] is not compelled by the statute.

The University states that the summary sheets "include candid evaluations of the candidate by the initial readers." It states further:

> The Admissions Office has considered simply destroying the sheets after their use, and may decide to do so [but] has not yet done so because the summary sheets are useful in explaining our processes in the case of a complaint by a disappointed application, or in the case of review initiated by an outside agency [e.g. to see whether ________'s practices are discriminatory. . . . [Emphasis added.]
>
> [I]f it is determined by the Department that the summary sheet must be disclosed, we believe that it should be redacted. . . . Indeed, Mr. ______ suggests redaction as a possible solution.

As I discussed more fully below, based on our review of Mr. ________'s allegations and the University's response, this Office finds that the University has denied Mr. ________ access to the summary sheet in violation of FERPA. We also find that the University is not required by FERPA to give Mr. ________ access to any portion of the summary sheet that is excerpted from or identifiably derived from a particular confidential letter or statement of recommendation -- unless the University has used the letter, or the portion of the summary sheet that is excerpted from or derived from the letter, for a purpose other than the purpose for which it was intended.

ANALYSIS

The issue to be decided in this complaint is whether the University violated FERPA when the Admissions Office denied Mr. ______ access to a summary sheet that was "created by [a]dmissions officers to help condense the material in Mr. ________'s application folder," "is heavily derivative of . . . teacher recommendations to which he waived access," and includes "candid evaluations of the candidate by the initial reader."

FERPA defines the term "education record" as

> [T]hose records, files, documents, and other materials which (I) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

20 U.S.C. 1232g(a) (4) (A). See also 34 CFR 99.3. Because the summary sheet at issue relates to a student (Mr. _______) and is maintained by the University Admissions Office, it is an "education record" subject to FERPA. The University takes the position that because "the University's policy is not to use the summary sheet for any purpose after the applicant enrolls and becomes a student,' [and because] it is . . . not used by the institution in making decisions that 'affect the life of a student[,]' . . It is not . . . protected by FERPA." However, the University also states that the reason it maintains the summary sheets on "students" after completion of the admissions process and does not destroy them is that "the summary sheets are useful in explaining our processes in the case of . . . review initiated by an outside agency."

Thus, it appears the University does use the summary sheets after the applicants enroll and become "students." Even if the University does not use them, however, the sheets are nevertheless subject to FERPA because they contain information related to students and are maintained by the University. Therefore, it is not necessary to consider the University's position further. Clearly, the summary sheets fall within the FERPA definition of "education records."

FERPA requires that an educational institution affords students the right to "inspect and review" the student's "education records." 20 U.S.C. 1232g (a) (1) (A). See also 34 CFR 99.10. There are certain limitations on the student's right to inspect and review "education records." The University proposes that one of those limitations applies in this case. 20 U.S.C. 1232g (a) (1) (B) (iii) and (C). See also 34 CFR 99.12(b) and (c). That limitation, as stated in 34 CFR 99.12, provides that

> (b) A postsecondary institution does not have to permit a student to inspect and review education records that are --
>
> (3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if --
>
> (i) The student has waived his or her right to inspect and review those letters and statements; and
>
> (ii) Those letters and statements are related to the student's --
>
> (A) Admission to an educational institution;
> (B) Application for employment; or
> © Receipt of an honor or honorary recognition.
>
> (c) (2) If a student has waived his or her rights under paragraph (bb) (3) (ii) of this section, the educational institution shall -
>
> (ii) Use the letters and statements of recommendation only for the purpose for which they were intended.
>
> (iii) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation[.] [Emphasis added.]

Under this provision, the limitation of a student's right to inspect and review applies to letters and statements of recommendation "provided" by individuals that are "related to the student's . . . [a]dmission to an educational institution" if the student has "waived his or her right" of access to the documents. The limitation does not apply to a summary sheet that is "created by [a]dmissions officers to . . . condense the material in [an] application folder" and that includes "candid evaluations of the candidate by the initial readers." [Emphasis added] Therefore, Mr. ________ Was entitled by FERPA to inspect and review the summary sheet that is related to him. However, the University was not required by FERPA to allow Mr. _______ to inspect and review any portions of the summary sheet that are excerpted or specifically derived from a confidential letter or statement to which Mr. _______ Clearly waived his right of access.

FINDING

Based on Mr. _______'s allegation and the response provided by the University as discussed above, this Office finds that the summary sheet at issue is an "education record" subject to FERPA. This office finds further that the University violated FERPA when it denied Mr. ______ the right to inspect and review those portions of the summary sheet that were not excerpts from, or specifically derived from, confidential letters and statements of recommendations to which he had waived his right to inspect and review under 34 CFR 99.12.

ACTIONS REQUIRED

This Office will close the investigation of Mr. _______'s complaint upon receipt of a written assurance that Mr. _______ has been afforded the right to inspect and review the summary sheet at issue in accordance with the provisions of FERPA discussed above. The University should also inform appropriate University personnel of the pertinent FERPA provisions.

Please provide the requested assurance within four weeks from your receipt of this letter. Thank you for the University's cooperation in resolving Mr. _______'s complaint.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

July 25, 1996

Ms. Nina Thomas
Registrar
Vermont Law School
Chelsea Street
South Royalton, Vermont 05068

Dear Ms. Thomas

This is in response to your facsimile of May 29, 1996, in which you request information on the Family Educational Rights and Privacy (FERPA). Specifically, you seek clarification on the release of students' social security numbers to entities within and outside of Vermont Law School (School). Following is a discussion of each of you questions.

Question

"Is there anything specific in FERPA that prevents the registrar's office from providing to the Alumni Office students' social security numbers upon graduation?" [Emphasis supplied.]

Response

FERPA generally protects a student's privacy interests in "education records." The term "education records" is defined as those records that are directly related to a student and that are maintained by an educational agency or institution or by a party acting for the agency or institution. FERPA generally requires that a school obtain a student's prior written consent before disclosing "personally identifiable information" from his or her education records. "Personally identifiable information" is defined under FERPA as including, but not limited to, the following:

(a) The student's name;
(b) The name of the student's parent of other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number;
(e) A list of personal characteristics that would make the student's identity easily traceable;
(f) Other information that would make the student's identity easily traceable.

600 INDPENDENCE AVE., S.W. WASHINGTON, D.C. 20202

There are exceptions to the disclosure of personally identifiable information from education records without prior consent. One such exception is when the disclosure is to individuals whom the school has designated in its student records policy as school officials with legitimate educational interests. 34 CR §99.31(a) (1). There is nothing in FERPA that would prevent the School from designating an individual (s) from the alumni office as a "school official." In this regard, the University would also be required to outline that individual's "legitimate educational interests" in obtaining access to student records. In sum, even though a student has graduated, the School must continue to protect a student's personally identifiable information contained in education records.

Question

"Is there, in turn, anything that prevents the alumni office from providing select SS#s, as the need arises, to outside organizations that provide a search for current addresses using this information?"

Response

As outlined above, there are exceptions to the disclosure of personally identifiable information from education records. One exception is the disclosure of "directory information." FERPA defines the term "directory information," as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. The definition then lists items that the standard includes, but is not limited to, such as: a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended. Social security numbers cannot be designated as directory information.

Accordingly, in general, absent a student's prior written consent, the Alumni Office could not disclose social security numbers to outside organizations. However, your question relates specifically to "organizations that provide a search for current addresses using this information," as the need arises. It is, therefore, important to note that FERPA's privacy protections are extended explicitly to records and materials maintained by persons "acting for an educational agency or institution." In so doing, FERPA recognizes that educational agencies or institutions do not necessarily perform all operations and services on an in-house basis and, in fact, frequently obtain professional, business, and other services with individuals and organizations outside the institution, such as attorneys, accountants, collection agents, and independent psychologists. FERPA's prior written consent requirement was not intended to and does not prevent institutions from disclosing education records to outside persons performing professional, business, and similar services related to the institution's mission that it otherwise would provide for itself.

If the Alumni Office has a contract or written agreement with an outside organization that is providing a service, in this case to search for current addresses of its students, the Alumni Office could disclose social security numbers of students to that organization, absent prior written consent of the students. Please note that FERPA limits the redisclosure of information from education records by third parties that receive such information. Therefore, personally identifiable information from education records that the outside organization receives from the Alumni Office cannot generally be redisclosed by that organization without the student's prior written consent. Section 99.33 of the FERPA regulations outlines the limitations that apply to the redisclosure of education records.

I trust that the above information is helpful in responding to your concerns. Enclosed for your review are copies of the FERPA regulations and a model student records policy for use by postsecondary institutions. For your information, the name, address, and telephone number of this office are as follows:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605
(202) 260-3887

Sincerely,

Leroy S. Rooker
Director
Family Compliance Office

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, DC 20202

Dear ____________

This is to respond to your recent letters to the Family Educational Rights and Privacy Act Office.

You asked whether the FERPA would permit the University of Washington to disclose information contained in your educational records to the Office of the Attorney General for the State of Washington. You also asked this Office to direct the Attorney General's Office to permit you to inspect its records that relate to you.

With regard to the first issue, I understand that the Office of the Attorney General serves as the attorney for the University of Washington. 20 U.S.C. §1232g (b) (1) (A) permits an educational institution to make disclosures without the prior written consent of the student to school officials with a legitimate educational interest in the records. Under that provision, an institution may disclose records to its attorney without obtaining the consent of the student.

As to the second issue, you included with your correspondence a letter form Mr. Steven Milam of the Office of the Attorney General, which states that the records to which you requested access are protected by attorney-client privilege. Although not cited in the statute, legislative history indicates that the FERPA should recognize attorney-client privilege. The December 13, 1974 Congressional Record reads:

> . . . It is important that common law privileges, such as doctor-patient and lawyer-client relations are not violated . . . The proposed amendment protects common-law and statutory privileges of confidentiality.

Because of the above, this Office cannot direct the Office of the Attorney General to permit you to inspect and review records that are protected by attorney-client privilege.

You also asked that this Office "exercise the power of receivership and take custody of all personally identifiable education records descriptive of myself retained by the University of Washington and the Office of the Washington Attorney General pending the outcome of a hearing before your Review Board . . . ." This Office does not have "power of receivership," and does not have the authority to take possession of records maintained by an educational institution or its representative. Moreover, the sole purpose of a hearing before the Review Board is to determine whether the Department will terminate an institution's education funds because it has failed to comply with the FERPA. Since it does not appear that the University of Washington has failed to comply with the FERPA, a hearing before the Review Board would not be appropriate.

Sincerely yours,

Patricia Ballinger
Director,
Family Educational Rights and Privacy Act

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

September 29, 1995

Mr. Wayne Johnson
Assistant Dean of Student Development
Gardner-Webb University
Boiling Springs, North Carolina 28017

Dear Mr. Johnson:

This is in follow-up to a letter this Office sent you on December 14, 1994, in response to a November 30, 1994, facsimile, from you. You asked whether the Family Rights and Privacy Act (FERPA) would permit Gardner-Webb University (University) to disclose the education records of a former student to its attorney and in court without the prior written consent of the student. Specifically, you stated that the student had filed suit against the University and the University attorney needed access to the student's academic and disciplinary records for possible information to use in its defense.

This letter relates to the guidance given in pages three and four of the December 14 letter, a copy of which is enclosed. In brief, we advised you that when an educational attorney in connection with litigation, the institution is required to make a reasonable effort to notify the student. However, subsequent to that December 14 letter, we have re-evaluated this issue and have determined that no prior notice would be required in the situation you described.

FERPA does not directly address the issue of disclosure to a court of law. However, we believe an educational institution may infer a student's implied waiver of the right to consent to the release of information from his education records when the student has sued the institution. As a policy matter, it is our determination that an institution must be allowed to defend itself when a student has sued the institution. Thus, FERPA protects students from institutions which release personally identifiable information from their education records without their consent. However, if a student sues an institution, just as when a client sues a lawyer[1], we have determined that common-law tenets dictate that a school must be allowed to redisclose information through its attorney in order to defend itself. Therefore, because a student who has initiated a lawsuit against a school has implicitly waived his/her right to consent to disclosure of information which is necessary for the school to defend itself, the FERPA provisions and conditions related to disclosure without consent do not apply. Thus, the University would not have to notify the student in advance of disclosing education records in court in response to a lawsuit initiated by the student.

---

[1] The attorney-client privilege prohibits a lawyer from disclosing confidences of a client, except when a client sues his attorney. See e.g., Laughner v. United States, 373 F.2d. 326, 327, n.1 (5th Cir. 1967).

Should you have further questions regarding this matter, or FERPA in general, please feel free to contact this Office.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

March 10, 1999

Mr. ______________
____
____

Dear Mr. ______________

This is in response to your September 15 and October 2, 1998, letters to this Office in which you allege that ___________ (College) violated your rights under the Family Educational Rights and Privacy Act (FERPA). This Office administers FERPA, which relates to your concerns.

You allege that the College violated your rights by denying you access to information regarding your application to a graduate program and to information "as to who (gender and age) and how many people had been denied admission to their Graduate Counseling Program and the reasons therefore." You also allege that the College violated your rights when the "_______ Police did contact Dr. Richard Spencer by telephone to ascertain [your] address." You state that you "do believe that Dr. Spencer did disclose to the police information other than address and telephone. . . ." Finally you alleged that "Any person from the ___________ College before, after or during the time that [you were] a student at the [College] ever informed [you] of [your] rights verbally or in writing regarding [FERPA]." It appears that all of your allegations relate to incidents which occurred in 1995 and 1996.

This Office investigates those timely complaints containing specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred. A complaint is timely if it is submitted to this Office within 180 days of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation. Because it appears that each of your allegations relate to incidents that occurred in 1995 and 1996, it appears that they occurred well over 180 days prior to the date you contacted this Office. As such, your allegations do not meet the threshold requirement on timeliness necessary for this Office to consider them.

Notwithstanding the fact that it does not appear that your allegations are timely, it does not appear that any of your allegations contain sufficient facts giving reasonable cause to believe that a violation of FERPA has occurred. Below is a discussion of FERPA and how it relates to your individual allegations.

Alleged Denial of Access to Records Related to You

You stated that "many times during the year, 1995, I did request information from Dr. Richard Spencer and various other members of the _______ Behavioral Science program . . . regarding my educational records pertaining to Graduate Appeals meetings I initiated to appeal the college[']s decision to deny my education." It appears that you requested information regarding notes and written materials from telephone interviews of your references as well as notes and written materials recorded "in association with the final meeting of the Graduate Appeals Committee. . . ." You provided a copy of a July 12, 1996, letter to you from Dr. Michele Moran Zide, Associate Vice President for Academic Affairs. Dr. Zide states in that letter:

- In regard to your request for additional information concerning minutes of meetings and other students['] standing in academic programs, please be informed that I am unable to provide you with that information.

- You are not a[n] individual who has standing under [FERPA] to have access to information you are seeking. Under the FERPA, an individual who is or has been enrolled in one component unit of an institution, who applies for admission to a second unit, has no right to inspect the records accumulated by the second unit until enrolled therein.

Section 99.3 of the FERPA regulations defines the term "student" as any individual who is or has been in attendance at an educational agency or institution. Also, the FERPA regulations provide that if an individual is or has been in attendance at one component of an educational institution, that attendance does not give the individual rights as a student in other components of the institution to which the individual has applied for admission but has never been in attendance. Consistent with the legislative history of FERPA, a rejected applicant for admission is not given rights under FERPA because a student who has been rejected by a component of a postsecondary institution has never attended the institution in that capacity.

Alleged Denial of Access to Information About Others

You alleged that the College violated your rights when it denied you "information relevant to [your] allegations against the college as to who (gender and age) and how many people had been denied admission to their Graduate Counseling Program and the reasons therefor." You stated that the College responded that "they do not keep records of that type and are not obligated to compile "new" records." You state that "those records should have been in place without the college having to compile new records."

FERPA requires that schools comply with a student's request for access to his or her education records within 45 days of receipt of the request. FERPA does not require schools to create or maintain education records, or to re-create lost or destroyed education records. Thus, a school would not be required to take information maintained in certain education records and compile it to create a new education record.

FERPA defines "education records" as those records that contain information that is directly related to a student and that are maintained by an educational agency or institution or a party acting for the agency or institution. A school is not required by FERPA to provide an individual access to any information contained in education records that is not directly related to that individual, even if that individual is a student. Further, except in certain limited circumstances, FERPA requires that an educational agency or institution ensure that a student has provided his or her prior written consent before disclosing information from a student's education records. Thus, a school generally cannot disclose information from a student's education records to another individual without the consent of the student to whom the information relates.

Alleged Disclosure of Information to the Police

You alleged that it is "[your] understanding that the _______ Police did contact Dr. Richard Spencer by telephone to ascertain [your] address" You further stated with respect to this allegation that you "do believe that Dr. Spencer did disclose to the police information other than address and telephone. . . ."

As noted above, FERPA generally requires that a student provide written consent before an educational agency or institution discloses personally identifiable information from the student's education records. There are several exceptions to the general prohibition on nonconsensual disclosures, some of which could apply to situations such as the one you have described. First, FERPA permits the nonconsensual disclosure of personally identifiable information from education records in connection with a health or safety emergency, such as in certain instances where the police are investigating a crime. Another exception permits the disclosure of education records in compliance with a lawfully issued subpoena or court order if the educational agency or institution makes a reasonable attempt to notify the student of the order or subpoena in advance of compliance.

A third exception permits the nonconsensual disclosure of address and telephone number if the information has been designated as "directory information," so long as certain conditions have been met. Directory information is defined in FERPA as information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. Directory information could include information such as name, address, telephone number, date and place of birth, participation in officially recognized activities and sports, and dates of attendance.

A school may disclose directory information to third parties without consent if it has given public notice of the types of information which it has designated as "directory information," the student's right to restrict the disclosure of such information, and the period of time within which a student has to notify the school in writing that he or she does not want any or all of those types of information designated as "directory information." A school is not required to inform former students regarding directory information or to honor their request that directory information not be disclosed. However, if a student, within the specified time period during the student's last opportunity as a student in attendance, requested that directory information not be disclosed, the school must honor that request until otherwise notified.

Alleged Failure to Notify of Rights under FERPA

You alleged that "no person from the ____________ State College before, after or during the time that [you were] a student at [the College] ever informed [you] of [your] rights verbally or in writing regarding [FERPA].

Schools are required to notify students of the right to inspect and review the student's education records and the procedure to do so; the right to seek amendment of records the student believes are inaccurate and the procedure to do so; and the right to consent to disclosures of education records except to the extent FERPA authorizes disclosure without consent. The notification must also inform students of their right to file a complaint with this Office and it must include a specification of criteria for determining who are school officials and what constitutes a legitimate educational interest in education records. A school is not required to notify students individually, but rather is required to provide the notice by any means that are reasonably likely to inform parents of their rights. These means could include publication in the school activities calendar, newsletter, or student handbook.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to your concerns.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

November 22, 1991

Robert H. Ulrich, Esquire
Assistant General Counsel
The University of Nevada System
Office of the Chancellor
2601 Enterprise Road
Reno, Nevada 89512

RE: Request for an Opinion

Dear Bob:

This responds to your request for an opinion concerning the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g. Specifically, you ask whether FERPA prohibits an educational agency or institution from disclosing records relating to a deceased student to that student's parents.

In a letter dated August 9, 1991, you explained that a student a the University of Nevada dies in somewhat bizarre circumstances. You believe that if the student were still living, the circumstances of the incident that resulted would injure his or her reputation. Further, you explained that the deceased was not a dependant student. Apparently, the parents of the deceased student now wish to review the University of Nevada Police Department records concerning the circumstances of his or her death.

FERPA was enacted, in part, to protect individual student's privacy. The Department has construed FERPA in a manner consistent with common law rules regarding privacy. At common law, an individual's right to privacy expires with the individual. Therefore, consistent with this common law rule, FERPA would not prohibit an educational agency or institution from disclosing records relating to a deceased student. It is noted, however, that FERPA would not compel the disclosure of such records, either. Therefore, FERPA would not bar an educational agency or institution from exercising its own discretion with respect to disclosure of records relating to deceased students.

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-2110

Please feel free to call me at 202-401-3690 if you have further questions concerning this issue.

Sincerely,

Susan A Winchell
General Attorney
Division of Business and
Administrative Law

cc: Leroy S. Rooker

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

March 9, 1993

Ms. Susan M. Faccenda
Assistant Vice President and Counsel
University of Notre Dame
Notre Dame, Indiana 46556

Dear Ms. Faccenda:

This is in response toy our letter of February 17, 1993, in which you request written confirmation from this office regarding rights of deceased students under the Family educational Rights and Privacy Act (FERPA). You provided a copy of a document entitled The Academic Archivist which indicates that personally identifiable information from education records should become public in census records seventy-two years after creation. The document also accurately states that such time period does not appear in FERPA. You ask for confirmation that the protections afforded by FERPA expire upon the death of the student and that FERPA does not allow the disclosure of education records based exclusively on the amount of time that has passed.

FERPA generally protects an eligible student's" privacy interests in "education records." Under FERPA an individual becomes an "eligible student" when he or she is 18 years of age or attends an institution of postsecondary education. The term "education records" is defined as records that are directly related to a student and maintained by an educational agency or institution.

FERPA does not address the issue of education records of deceased students. However, based on common law principles relating to privacy rights, the privacy rights of an individual generally expire with the individual's death. Accordingly, we have determined that the education records of a deceased "eligible student" are not protected by FERPA and that an institution may disclose those records at its discretion.

As noted in The Academic Archivist, FERPA does not make reference to a time period of seventy-two years after which education records could become public. While it may be reasonable to assume that after a certain number of years, a former student is no longer living and that education records and that education records relating to that individual would no longer be protected by FERPA, this may not necessarily be the case. In the event that this office received a complaint containing specific allegations of fact giving reasonable cause to believe that an institution improperly disclosed information from education records, we would initiate an investigation based on that complaint.

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I trust that the above information is helpful in explaining FERPA as it relates to the education records of deceased students. Is you have further questions, please do not hesitate to contact this Office again.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

June 21, 1996

Mr. Gary Gibson
Superintendent
Adams County School District 14
4720 East 69th Avenue
Commerce City, Colorado 80022

Complaint No.- _____
Family Education Rights and
Privacy Act

Dear Mr. Gibson:

This is to inform you of the finding in the complaint filed with this office against Adams County School District 14 (District) by Ms. __________. By letter dated October 24, 1995, this Office informed you of Ms. __________'s allegation that the District violated privacy rights afforded parents by the Family Educational Rights and Privacy Act (FERPA). Specifically, Ms.__________ alleged that in May 1995 and on August 21, 1995, Ms. Barbara Conroy, Executive Director of Communications, denied her access to her daughter, __________'s education records. In this regard, Ms.__________ alleged that Ms. Conroy allowed her the opportunity to inspect and review all of her daughter's records with the exception on one "administrative letter."

By letter dated November 10, 1995, Mr. Robert I. Cohn, Attorney, responded on behalf of the District. Regarding Ms.__________'s allegation, Mr. Cohn states the following:

> Our records indicate that Mrs. __________ has had access to and has reviewed all educational records regarding her daughter, __________, in accordance with §99.10 of the Family Educational Rights and Privacy Act regulations. The single document that was not shown to Mrs. __________ is an internal memo that is not intended to be maintained as an educational record, nor is the content of the memo directly related to the student. The clear focus of the memo is an alert to the superintendent of the educational department's response to a request from Mrs. __________ and the anticipated response from the mother.

Mr. Cohn provided this Office with a copy of the March 22. 1995, memorandum, written to you from Ms. Conroy. FERPA provides that a parent has the right to "inspect and review" the education records of his or her child. 20 U.S.C. §1232g (a) (1) (A). FERPA defines the term "education records" as:

> except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such an agency or institution.

20 U.S.C. §1232g (a) (4) (A).

The District does not dispute that the letter is "maintained" but contends that "it is not intended to be maintained as an educational record." However, the reason for which an education record is maintained does not affect its status as an education record. Rather, the fact that a record is maintained and is directly related to a student makes it an education record under FERPA.

In support Mr. Cohn's assertion that the document requested by Ms.__________ is not an "education record" of Ms. __________'s daughter, he states that the content is not directly related to __________. As noted above, FERPA expressly affords parents the opportunity to inspect and review their minor children's education records, i.e., those records a school or school district maintains that contain information that is directly related to that student. FERPA does not require that education records relate exclusively to the student, only that they contain information that is directly related to the student. Here we would note that any record that is personally identifiable to a student makes it directly related to the student if it is maintained.

Section 99.3 of the FERPA regulations defines "personally identifiable information" as including, but not limited to, the following:

(a) The student's name;
(b) The name of the student's parent or other family member;
(c) The address of the student or the student's family;
(d) A personal identifier, such as the student's social security number;
(e) A list of personal characteristics that would make the student's identity easily traceable;
(f) Other information that would make the student's identity easily traceable.

The fact that __________'s name, or her mother's name, is mentioned in the memorandum, makes it personally identifiable to __________. Therefore, the letter to which Ms. __________ is seeking access is clearly a part of her daughter's education records under FERPA and Ms. __________ has a right to inspect and review that record. Consequently, the Office finds that the District violated FERPA when it denied Ms. __________ access to the memorandum.

Please provide within four weeks of receipt of this letter, written assurance that Ms __________ has been afforded the opportunity to inspect and review the memorandum written by Ms. Conroy. Additionally, please provide this office written assurance that appropriate officials of the district have been informed of the FERPA definition of educational records and the requirements of FERPA as they relate to providing parents access to their children's education records.

Thank you for your continued cooperation with regard to this matter.

Sincerely,

Leroy S. Rooker
Director
Family Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

April 23, 1996

Mr. Robert E. Bienstock
Associate University Counsel
The University of New Mexico
Scholes Hall 152
Albuquerque, New Mexico 87131-0056

Dear Mr. Bienstock:

This is in response to your March 18, 1996, letter to this Office in which you ask whether educational agencies and institutions are permitted to define directory information more narrowly than the term is defined in the Family Educational Rights and Privacy Act (FERPA). You state that some universities give a narrow definition of directory information to afford students better privacy protection.

As you are aware, FERPA affords students certain rights with respect to their education records, including the right to consent to most disclosures of such records. The term education records is defined as those records which contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for such agency or institution. 34 CFR § 99.3 "Education records." FERPA generally prohibits the nonconsensual disclosure of education records, or personally identifiable information from education records, except in certain unspecified circumstances, such as when the educational agency or institution has appropriately designated the information to be disclosed as "directory information." 34 CFR § 99.31 (a) (11). While FERPA permits the nonconsensual disclosure of directory information, it does not require disclosure of information from education records to any third party. 34 CFR § 99.31 (b).

A school may disclose directory information if it has given public notice of the types of information which it has designated as "directory information," the student's right to restrict the disclosure of such information, and the period of time within which a student has to notify the school in writing that he or she does not want any or all of those types of information designated as "directory information." 34 CFR § 99.37 (a). FERPA defines directory information as information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. 34 CFR § 99.3 "Directory information." Directory information includes but is not limited to, information such as name, address, telephone number, date and place of birth, participation in officially recognized activities and sports, and dates of attendance.

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The definition of directory information in FERPA is generally a guideline for schools to use in designating types of information as directory information. Directory information does not have to be limited to those types listed in FERPA; for instance, a school may designate photographs and E-mail addresses as directory information. Further, in response to your specific question, a school is not required to designate all of the types of information. As noted above, the disclosure of directory information is not required by FERPA and thus the decision as to whether to designate certain types of information as directory information is left to the discretion of the individual educational agency or institution.

Enclosed for your review and comment is a copy of the Notice of Proposed Rulemaking on FERPA, which includes proposed regulatory amendments to implement changes made to the law by the Improving America's Schools Act of 1994. Please note that any comments in the NPRM must be received by this Office by May 13, 1996.

I trust that the above information is helpful to you. Should you have additional questions regarding this matter or FERPA in general, please do not hesitate to contact this Office again.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

Enclosure

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

August 3, 1994

Mr. Peter N. Swan
Assistant to the President
for Legal Affairs
University of Oregon
Eugene, Oregon 97403-1226

Dear Mr. Swan:

This is in follow-up to your telephone conversations of April 22 and May 14, 1993, with Ellen Campbell of my staff regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g) to the Student Right-to-Know and Campus Security Act (20 U.S.C. §1092) provisions regarding disciplinary proceedings. By facsimile dated April 20, 1993, you requested advice from this Office regarding this issue. Specifically, you asked the following:

> Pub. L. No 102-325, § 486 (5) (7-23-92) states that effective "with respect to periods of enrollment beginning on or after 7-1-93", 20 U.S.C. §1092 is amended by the Student Right-to-Know and Campus Security Act to add a new subsection (7) at the end of subsection (f) to require that the University develop a policy that, in on-campus disciplinary proceedings involving alleged sexual assault, "the accuser and the accused are entitled to the same opportunities to have others present."
>
> We therefore request from your office a written advisory regarding the following:
>
> 1. In light of this statutory requirement and when the accused is a student, if the accused does not waive his or her rights to a closed hearing, will the University be in compliance with FERPA in allowing the accuser to be present throughout the hearing (not just when he or she testifies or at arguments for formulating sanctions) and; if he or she wishes, to be accompanied by his or her friend, counselor, spouse, or attorney?

Your second question pertained to technical information related to reporting requirements under the Student Right-to-Know and Campus Security Act. As you were advised, the Office of Postsecondary Education (OPE) would have to respond to any inquiries concerning campus crime reporting requirements.

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As you were also advised, at that time there were no formal guidelines on how to interpret the provision you had noted and that, if you followed the provisions outlined in the Student Right-to-Know and Campus Security Act, this Office would not take any actions against the University should a FERPA complaint be received. Since you were given that advice, OPE issued a Notice of Proposed Rulemaking, this Office has met with OPE's Student Financial Assistance Programs, changes were made to their proposed regulations, and final regulations were issued. Accordingly, we would like to revise our oral advice to you as follows.

The Student Right-to-Know and Campus Security Act of 1990, as amended in 1992, requires postsecondary educational institutions to adopt procedures for on-campus disciplinary actions in cases of alleged sexual assault, which must include a clear statement that --

> (I) The accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and
>
> (II) Both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.

20 U.S.C. §1092 (f) (7) (B) (iv). We believe the law requires that the accuser and the accused are entitled to the same opportunities to have others present, but does not entitle the accuser to be present throughout the proceeding. For example, if the institution permits the accused to have an attorney or other representative present, then it must permit the accuser to do so during those times when the accuser is otherwise permitted to be present at the proceeding. This means that if the accused has not consented to the disclosure of education records, or information from education records, at this proceeding, then the accuser is not entitled under Federal law to be present when this information is disclosed. This also applies to any other persons at the proceeding, such as witnesses, the press, etc. (Hearing officials should be considered "other school officials with a legitimate educational interest" in the records under the school's FERPA policy in accordance with 34 CFR §99.31 (a) (1).) You may also wish to refer to OPE's preamble and rule on this matter which was published in the Federal Register on April 29, 1994, a copy of which I've enclosed.

Also enclosed for your information are a copy of the FERPA regulations and a model student records policy. Should you have additional questions specific to FERPA, please do not hesitate to contact us. The correct name and address of this Office are as follows:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-4605

I trust the above adequately responds to your inquiry, and I apologize that we are unable to provide you with an earlier specific response.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosures

cc: Paula Husselmann, OPE

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

June 30, 1994

Dr. David S. Yeh
Assistant Vice President and
University Registrar
Cornell University
Ithaca, New York 14853-2801

Dear Dr. Yeh:

This is in response to your letter dated July 26, 1993. You ask whether the Family Educational Rights and Privacy Act (FERPA) allows for the release of a transcript or other information from education records pursuant to an electronic request from the student. You state that the University has developed a computer system that allows students to access their own education records via computer terminals stationed across campus and that the University is currently working toward expanding the system to allow students to request, or authorize, the release of a transcript or other information from education records electronically. In this regard you state:

> We are designing a system that requires that when a student first receives his or her unique network identification number and a personal password, he or she must sign a written release form. This document authorizes future releases of that student's transcripts via his or her (and only his or her) electronic request. A student must use a 10-digit electronic password to . . . authenticate an electronic request for a transcript. The transcript releases would only occur if the individual student had originally signed the authorization document and then only after the student entered his or her personal password.

FERPA generally requires that students provide signed and dated consent before an institution of postsecondary education discloses education records, or personally identifiable information from such records, to a third party. The written consent must (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made 20 U.S.C. §1232g(b); 34 CFR §99.30. There are several exceptions to the prior written consent provision of FERPA. One of these exceptions allows nonconsensual disclosure to the eligible student to whom the records relate. 34 CFR §99.31 (a) (12).

Another exception to the prior written consent provision allows nonconsensual disclosure, under the conditions set forth in 34 CFR §99.34, to a school, school system, or institution of postsecondary education in which a student seeks or intends to enroll. Section 99.34 provides, in part, that a college can send a student's education records to another college or university in which the student is seeking or intending to enroll without prior written consent or notification if the student initiates the disclosure. Accordingly, if a student requests that his transcript be forwarded to another school, whether that request is made in person, in writing, by telephone, or by electronic transmission, FERPA would not prevent an institution from releasing that student's transcript, or other records specified by the student, without prior written consent meeting the requirements of §99.30(b). However, when such a request is made by a student by telephone or electronic transmission, the school should be reasonably sure that the request was indeed made by the student.

Any other type of disclosures, for instance to a potential employer, which a student may request through electronic transmission, would have to be accompanied by prior written consent as discussed above. An educational institution could afford students an opportunity to provide general written consents for routine use in the event the student later wants to request release by telephone or electronic transmission. With respect to release of transcripts to an employer or prospective employer, the written consent would have to (1) specify "transcripts" (or other records) as the records that my be disclosed, (2) state that "application for and in connection with employment" is the purpose of the disclosure, and (3) identify "employers or prospective employers" as the class of parties to whom the transcripts may be disclosed. The institution should then use its own judgement in deciding whether to disclose education records pursuant to a student's request which is submitted by telephone or electronic transfer.

This Office, in administering the law, would investigate any complaint which contains specific allegations of fact giving reasonable cause to believe that an educational agency or institution improperly disclosed information from a student's education records in response to a request for the disclosure received by electronic transmission. The institution should implement any procedures it believes necessary to verify a student's identity before disclosing education records pursuant to a student's request made by telephone or electronic transmission. Accordingly, when possible, educational agencies and institutions should require written requests for information.

Finally, we note that an educational agency or institution which releases education records under 34 CFR §99.31(a) (2) and 34 CFR §99.34 must comply with the recordkeeping requirements of 34 CFR §99.32 and the conditions that limit disclosure of information set forth in 34 CFR §99.33. The recordkeeping requirements of 34 CFR §99.32 do not apply if the student has provided a written consent under 34 CFR §99.30 (b).

I trust the above information adequately explains the scope and limitations of FERPA as it pertains to your inquiry. Please feel free to contact this Office with any questions. Enclosed for your reference are a copy of the FERPA regulations and a copy of our recently updated model student records policy for use by postsecondary educational institution.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

May 14, 1996

Mr. Mark T. Dunn
Dunn, Hundman & Stanczak
1001 North Main Street
Post Office Box 3488
Bloomington, Illinois 61702-3488

Dear Mr. Dunn:

This is in response to your letter of February 27, 1996, in which you request information on the Family Educational Rights and Privacy Act (FERPA) as it applies to the disclosure of students' names who have received legislative scholarships to state universities. Specifically, you explain that your client, the Board of Trustees of Northeastern Illinois University (NEIU) received an Illinois Freedom of Information Act request from the Peoria Journal Star, a central Illinois newspaper, for the names of all students enrolled at NEIU who are attending on full or partial tuition waivers through state legislators, including the name of the legislator authorizing each scholarship. You further explain that one exemption (5 ILCS 140/2 (1) (a)) of the Illinois Freedom of Information Act provides that information prohibited from disclosure by federal or State law shall be exempt from inspection and copying. It is the University's position that FERPA would prohibit the disclosure of the requested information absent the prior written consent of the student(s). With respect to the above, you state the following:

> Despite the University's interpretation, those seeking access to the requested information take the positions that (1) FERPA itself does not prohibit the release of such records, (2) such information is not an "educational record" within the meaning of FERPA, and (3) 20 U.S.C. §1232g(b) (1) (D) permits the release of information relating to financial aid. While the University is prepared to argue that FERPA's provision are an effective prohibition from disclosure of educational records without first obtaining required consents, we would appreciate your assistance in responding to the contentions that information relating to legislative scholarships is not an "educational record" and that the Act permits the release of information relating to financial aid.

As will be discussed more fully below, FERPA would prohibit the disclosure of the names of NEIU students who are attending on full or partial tuition waivers through state legislators absent those students' prior written consent.

FERPA generally protects a student's privacy interests in education records. "Education records"are defined as:

> those records, files, documents, and other materials which (I) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a party acting for such agency and institution.

20 U.S.C. §1232g (a) (4); 34 CFR 99.3 "Education records."

As you correctly indicate in your letter, the documents and records that would identify a particular student as a recipient of financial aid are "education records" under FERPA. This is because such information is directly related to the student and maintained by the educational agency or institution or by a party acting for such agency or institution. Further, FERPA does not make a distinction between certain forms of financial aid from other forms. Therefore, the information to which the Peoria Journal Star is seeking access is considered "education records" under FERPA.

You describe the legislative scholarships, provided for at 5 ILCS 5/30-9 of the Illinois statute, as follows:

> . . . such legislative scholarships may be based on competitive examination, but there is no requirement that they must be awarded on the basis of either competition or scholarship. NEIU is informed and believes, based on public newspaper reports, that such scholarships are sometimes "need" based and sometimes awarded on grounds associated with neither need nor academic competition. NEIU is not generally made aware of the basis on which any particular scholarship is awarded. The basis upon which a legislative scholarship is granted is a matter primarily between the recipient and the awarding legislator. [Emphasis added.]

Section 99.31 of the FERPA regulations describes the conditions under which a university may disclose information from a student's education records without the student's consent. Section 99.31 (11) states that a university may disclose information that it has designated as "directory information" under the conditions set forth in §99.37.

"Directory information" is defined in §99.3 of the regulations as information contained in an education record of a student which would generally not be considered harmful or an invasion of privacy if disclosed. The definition then lists items that the standard includes, but is not limited to, such as: a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended.

Section 99.31 (a) (11) of the FERPA regulations addresses the disclosure of directory information. Section 99.37 sets forth the requirements that a university must follow in order to disclose directory information. Specifically, a university is required to give public notice to its students of the types of personally identifiable information the institution has designated as directory information. Under FERPA, a university is required to afford students the opportunity to notify the university in writing if he or she does not wish the information to be designated as directory information.

Therefore, consistent with FERPA, a university could disclose information from a student's education records concerning scholarship or financial aid if the following conditions exist:

1) the financial aid or scholarship is considered an honor or award based on academic or athletic achievements;

2) the category of information has been properly designated as "directory information" as set forth in §99.37 of the FERPA regulations; and

3) the student whose records have been requested has not indicated that he or she does not wish directory information disclosed.

Therefore, if a scholarship is considered an honor or award based on academic or athletic or other achievement, NEIU could disclose such information if that category of information has been properly designated as "directory information" as discussed above. However, this would not be the case in the situation you describe. This is because the criteria for many of the recipients of the legislative scholarships, as you indicate, is sometimes undefined or could be "need" based. Therefore, because the release of this information in personally identifiable form could be potentially harmful or an invasion of privacy, FERPA would preclude NEIU from disclosing this information to the media without the prior consent of the recipient.

With regard to the disclosure of the names of the legislative scholarship recipients under the financial aid exception, you state the following:

> In determining whether financial aid information may be disclosed under 20 U.S.C. g (b) (1) (D), the University is guided by 34 CFR §99.31. We understand that regulation to provide an authoritative interpretation by the DOE that FERPA does not permit the disclosure of financial aid information without prior consent except under the circumstances provided therein. Again, we would request your assistance with respect to the issue.

As mentioned above, FERPA generally protects a student's privacy interests in education records. Another exception to the general prohibition on disclosure of education records permits disclosure if it is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to determine eligibility or to enforce the terms and conditions of the aid. 34 CFR §99.31 (a) (4). If the disclosure of information is necessary to determine the eligibility for aid or to enforce the terms and conditions of the aid, then disclosure of information regarding student loans from students' education records is within the exception at 34 CFR §99.31 (a) (4). However, because the disclosure of the legislative scholarship information to the media would not be necessary to enforce the terms and conditions of the financial aid, NEIU could not disclose the requested information to the Peoria Journal Star under this exception.

I trust that the above information is responsive to your inquiry. If you have further questions regarding this matter, please do not hesitate to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Officer

Mr. Jonathan Talisman
Tax Legislative Counsel
Department of the Treasury
Room 1334
1500 Pennsylvania Ave., NW
Washington, DC 20220

Mr. Stuart Brown
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Mr. Talisman and Mr. Brown:

This letter responds to your request for an opinion regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C.§ 1232G; 34 CFR Part 99) to the reporting requirements of the Hope Scholarship Credit and the Lifetime Learning Credit provisions of the Taxpayer Relief Act of 1997 (the "Act"). Pub. L. No. 105-34, § 25 A(c), 111 Stat. 788, 804 (1997). Specifically, on October 21, representatives of my Office and the Department's Office of General Counsel met with Ms. Catherine Livingston of the Department of Treasury to discuss whether FERPA would prohibit educational agencies and institutions from complying with 26 U.S.C. §6050S. This section amends the tax code and requires disclosure of certain information to the Internal Revenue Service (IRS). As discussed below, although the Act does not explicitly exempt institutions from complying with FERPA, we believe that Congress intended for institutions to disclose information from student education records, as required by the Act, without first obtaining the consent of the students in question.

Section 25A(c) of the Act states the following:

> (c) Returns Relating to Tuition and Related Expenses
>
> (1) In General -- Subpart B of part III of subchapter A of chapter 61 . . . is amended by inserting after section 6050R the following new section:
>
> Sec. 6050S. Returns Relating to Higher Education Tuition and Related Expenses.
>
> (a) In General -- Any person --
>
> (1) which is an eligible educational institution which receives payments for qualified tuition and related expenses with respect to any individual for any calendar year, or
>
> (2) which is engaged in a trade or business and which, in the course of such trade or business, makes payments during any calendar year to any individual which constitute reimbursements or refunds (or similar amounts) of qualified tuition and related expenses of such individual,
>
> shall make the return described in subsection (b) with respect to the individual at such time as the Secretary may by regulations prescribe.

> (b) Form and Manner of Returns -- A return is described in this subsection if such return --
>
> (1) is in such form as the Secretary may prescribe,
>
> (2) contains --
>
> (A) the name, address, and [Taxpayer Identification Number (TIN) of the individual with respect to whom payments described in subsection (a) were received from (or were paid to),
>
> (B) the name, address and TIN of any individual certified by the individual described in subparagraph (A) as the taxpayer who will claim the individual as a dependent for purposes of the deduction allowable under section 151 for any taxable year ending with or within the calendar year, and
>
> (C) the --
>
> (i) aggregate amount of payments for qualified tuition and related expenses received with respect to the individual described in subparagraph (A) during the calendar year, and
>
> (ii) aggregate amount of reimbursements or refunds (or similar amounts) paid to such individual during the calendar year, and
>
> (D) such other information as the Secretary may prescribe.

(Emphasis added.) Thus, the Act requires postsecondary institutions to collect information on any individual who has paid tuition or related expenses to the institution. Therefore, the Act's reporting requirements apply to all students who have paid tuition or related expenses to a postsecondary institution, and whether a student has applied to receive a tax credit under the Hope Scholarship Credit or the Lifetime Learning Credit provisions of the Act is not a consideration in our analysis of this issue as it relates to FERPA.

Additionally, Ms. Livingston explained that the "other information as the Secretary [of the Treasury] may prescribe" will include:

- whether the student "is carrying at least ½ the normal full-time work load for the course of study the student is pursuing" (See § 25A(b)(3)(B));
- whether the student "has completed (before the beginning of such taxable year) the first 2 years of postsecondary education at an eligible educational institution" (See § 25A(b)(3)(C)); and
- the name and employment identification number of the institution.

FERPA protects the privacy interests of parents in their children's "education records," and generally prohibits the disclosure of education records without the consent of the parent. When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student"[1] under FERPA and all of the rights afforded by FERPA transfer from the parents to the student. The term "education records" is broadly defined as all records, files, documents and other materials which:

> contain information directly related to a student; and are maintained by the educational agency of institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); See also, 34 CFR §99.3 "Education Records." Accordingly, information directly related to the student and maintained by the institution, such as his or her TIN, is information from an education record and is subject to FERPA.

FERPA generally provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining the prior written consent of the student. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A). See also 34 CFR §99.30. Although there are 13 exceptions to the prohibition that personally identifiable information from education records may not be released without the students' consent, none of those exceptions are applicable here.

In short, the Act conflicts with FERPA because the Act requires postsecondary institutions to disclose information from education records to the IRS and, in some cases, to the parent(s)[2] of students, and because FERPA generally prohibits a postsecondary institution from releasing educational records or personally identifiable information from those records without the consent of the student. See 20 U.S.C. § 1232g(b)(1) and Pub. L. No 105-34, §25A(c), 111 Stat. 788, 804 (1997).

In determining which of two conflicting federal laws controls, the United States Supreme Court has stated that it "must read the statutes to give effect to each if [it] can do so while preserving their sense of purpose." Watt v. Alaska, 451 U.S. 259, 266 (1981). If the statutes are in irreconcilable conflict, then the more recently enacted statute governs. Id at 267, citing 2A C. Sands, Sutherland on Statutes and Statutory Construction § 51.02 (4th ed. 1973). See also Detweiler v. Pena, 38 F.3d 591,594 (D.C. Cir. 1994). The Department believes that, as the later enacted and more specific statute, the Act reflects congressional intent that the information specified in 26 U.S.C. §6050S be reported to the IRS notwithstanding FERPA's privacy provisions.

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[1] The term "eligible student" should not be confused with the same term mentioned in the Act. The Act's use of the term "eligible student" refers to a student who meets the requirements of the Higher Education Act of 1965, as amended (20 U.S.C. §1091 (a)(1)).

[2] The Act requires postsecondary institutions to disclose information from an education record to any individual whom the student certifies will be claiming the student as a dependent for tax purposes. See 26 U.S.C. §6050S(d), as amended by Pub. L. No. 105-34, §25A(c)(1). Such disclosures are permissible under FERPA. See CFR §99.31(a)(8).

In addition, please note that FERPA limits the redisclosure of information from education records by third parties that receive such information. We do not believe that these provisions are superseded by the Act. Therefore, information from an education record that the IRS receives from an institution cannot generally be redisclosed without the student's prior written consent. Section 99.33 of the FERPA regulations outlines the limitations that apply to the redisclosure of education records. Section 99.33(a)(1) states:

> An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

FERPA was amended in 1994 to include sanctions against a postsecondary institution should an improper redisclosure of information from education records occur. The statute states:

> If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

20 U.S.C. § 1232g(b)(4)(B). Therefore, if the IRS improperly redisclosed information from a student's education record that it received from a particular institution, that institution could be precluded by FERPA from making further disclosures to the IRS for a period of at least five years.

Further, FERPA establishes certain recordkeeping requirements regarding requests for access to and disclosures of education records. In this regard, FERPA states:

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals [except as provided below], agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. . . .

20 U.S.C. § 1232g(b)(4)(A). See 34 CFR §99.32. FERPA also provides that an educational agency or institution does not have to keep a record if the request was from or the disclosure was to: 1) the parent or eligible student; 2) a school official within the educational agency or

institution who is determined to have a legitimate educational interest; 3) a party with written consent; 4) a party seeking directory information; or 5) a party requesting or receiving the records as directed by a Federal grand jury or other law enforcement subpoena when the issuing court or agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 34 CFR §99.32(d).

It is our understanding that students will be notified of the disclosure to the IRS. In most cases, students will be asked to provide certain information on a form prepared by the IRS, and submit the form to the institution. The school will then forward information collected on the form to the IRS, as well as the student and, in some cases, the parent(s). The evident purpose of §99.32 is to ensure that parents and eligible students will be able to learn about disclosures made from the student's education records. In this circumstance, the IRS' procedures will satisfy that purpose because the student will be provided actual notice of the release of information to the IRS.

Accordingly, and to reduce any burden on the public, we have determined that postsecondary institutions will not have to separately keep a record of the disclosure of the information from student education records to the IRS.

I trust that the above information is responsive to your inquiry. Should you have additional questions regarding FERPA or this matter, you may contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Catherine Livingston
Department of the Treasury

Jasper Howard
Internal Revenue Service

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

February 19, 1997

Dr. Daniel Nathans
Interim President
250 Garland Hall
Johns Hopkins University
3400 North Charles Street
Baltimore, Maryland 21218

Complaint No. 0623
Family Educational Rights
and Privacy Act

Dear Dr. Nathans:

This is to advise you of our decision regarding Johns Hopkins University's (University) July 10, 1996 request that this Office reconsider its position and subsequent finding in the complaint filed with this Office by Mr. Louis Fintor. Mr Fintor alleged that the University violated his rights under the Family Educational Rights and Privacy Act (FERPA) when it improperly disclosed a copy of a May 18, 1995 letter to him from Dr. Alfred Sommer, Dean, School of Hygiene and Public Health, to his employer, the Office of Training, National Cancer Institute (NCI).

This Office informed the University by letter, dated August 14, 1995, that it had violated FERPA as alleged. Our finding was based on § 99.30 of FERPA, which generally requires that a student provide written consent before an educational institution discloses a student's education records, and because none of the exceptions to this written consent provision applies in this case. In addition, we explained that the University's argument that Mr. Fintor consented to the disclosure of its response to NCI did not meet the consent requirement of FERPA.

Because it appeared that the NCI was not rendering a decision affecting the University, we determined that a disclosure of information derived from Mr. Fintor's education records would not be appropriate without Mr. Fintor's prior written consent. We therefore asked in our letter of finding and in subsequent letters dated September 29, 1995, and June 20, 1996, that the University provide assurance that it would take appropriate corrective action to come into compliance with FERPA.

By letter dated July 10, 1996, Mrs. Estelle A. Fishbein, vice president and general counsel of the University, noted that Mr. Fintor sent a copy of the letter to NCI specifically to enlist the support of NCI in the pursuit of his claim against the University. As such, the University believed that it was entirely appropriate for Dean Sommer to correct Mr. Fintor's representation to NCI before it determined whether or not to take up Mr. Fintor's case.

This Office has recently established a written policy for situations where a student or parent initiates legal action against a school. In the November 21, 1996 Final Rule we stated:

> While FERPA does not directly address this issue, the Department interprets FERPA to allow an educational agency or institution to infer the parent's or student's implied waiver of the right to consent to the disclosure of information from the student's education records it the parent or student has sued the institution. The Secretary believes this interpretation is sound because an educational institution must be able to defend itself if a parent of student has initiated legal action against the agency or institution.

See G1 FR 59292, 59294 (November 21, 1996).

Based on the additional information provided by the University in its July 10 letter, we have determined that this complaint is analogous to an educational institution inferring a student's implied waiver of the right to consent to the release of information from his education records when the student has sued the institution. In both instances, the student had requested the involvement of an entity outside of the institution, and it is logical and appropriate that the institution would respond on record.

Therefore, we believe that if a student has taken an adversarial position against an institution, made written allegations of wrongdoing against the institution and shared this information with third parties, the institution must be able to defend itself. In order to defend itself, it would be difficult for an institution to provide a response without referring to the student's education records. Thus, this Office is reversing its August 14 determination and concludes that the University did not violate FERPA when Dean Sommer copied the NCI in his May 18, 1995 response to Mr. Fintor. We are therefore closing the investigation of this complaint. Mr. Fintor will be advised of our decision by copy of this letter.

Thank you for your cooperation with the investigation of this complaint.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. Louis Fintor
Mrs. Estelle A. Fishbein

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

June 22, 1998

Dr. Hoke Smith
President
Towson State University
Towson, Maryland 21204-7097

Complaint No. _______
Family Educational Rights
and Privacy Act

Dear Dr. Smith:

This is to advise you of the partial finding in the complaint filed with this Office by Ms. _______ under the Family Educational Rights and Privacy Act (FERPA). Ms. _______ alleged that Towson State University (University) violated her rights under FERPA when it disclosed information from her education records to [a newspaper] and when it denied her access to certain of her education records. By letter dated February 18, 1998, this Office advised you of the allegations and by letter dated March 27, 1998. Mr. Michael A. Anselmi, University Counsel, responded on behalf of the University. Each allegation is discussed separately below.

ALLEGATION 1

_______ alleged in her December 20, 1997 letter to this Office that the University violated her rights under FERPA when Mr. Anselmi disclosed without her consent her education records and medical records to _______, a reporter for [the newspaper]. She stated that the article came out on or before ______ and that she learned of it on _______. She explained that Mr. Anselmi provided [the reporter] with a consent for her to sign prior to disclosing information from her education records, but that upon seeing the consent she "had second thoughts about doing the article at all." She stated that when she next spoke with [the reporter], she was advised that Mr. Anselmi had already disclosed information from her education records based on "the recent Family Policy Compliance Office ruling that allowed Johns Hopkins University to release information to a third party without written consent."

Mr. Anselmi responded to this allegation by asserting that the University had not violated FERPA as alleged when it disclosed information from Ms. ________'s education records to [the newspaper] because Ms. _______ "impliedly waived her right to consent." Mr. Anselmi cited in support of his claim a February 19, 1997 letter of finding issued by this Office in which we ruled that Johns Hopkins University had not violated FERPA when it disclosed information from a student's education records to the student's employer, the National Cancer Institute (NCI). Mr. Anselmi stated the following:

> Although FERPA regulations do not address waiver, the Department has ruled that students can impliedly waive the right to consent to disclosure. Specifically, in the November 21, 1996 Final Rule, the Department ruled that a student who sues a school impliedly waives the right to consent to disclosure before the school releases information in its defense. See 61 FR 59292, 59294. Thereafter, by letter of ruling of February 19, 1997 . . . the Department extended the reach of the implied waiver rule and said that universities may release information from student records, without consent where (1) "a student has taken an adversarial position against an institution"; (2) "made written allegations of wrongdoing against the institution"; and (3) "shared this information with third parties." As more particularly shown below, _______ has a long history of filing charges of wrongdoing against the University. This history, coupled with the seriousness of the charges she made to [the newspaper], fully supports a finding of waiver in this matter.

Mr. Anselmi further stated that Ms. _______ had previously sought to involve third parties in her dispute with the University by contacting them in writing about her concerns. He provided a list of those parties, which includes accrediting associations, state legislators, the Maryland Higher Education Commission, the Attorney General of Maryland, the Chancellor of the University of Maryland System, the Maryland State Treasurer, and [another newspaper]. He asserts that Ms. _______'s history in contacting third parties with "convenient and purposeful disclosure of her educational records . . . clearly weakens her claim of confidentiality in these records." He further stated the following:

> Apparently, as a last resort, _______ wrote [the newspaper] in _______. . . . Following review of the charges, _______, a _______ reporter, telephoned the University's attorney in _______ asking for _______ information about _______ charges. [The reporter] said _______ provided her a number of documents to support her claims. . . . During the phone call, [the reporter] verbally summarized _______'s allegations. . . .

* * * * *

> [The reporter] informed the University that she would report on these charges and she requested a timely University response. [The reporter] said she spoke to _______ and that _______ would consent to the University's reference to educational records in its response to the charges. By letter dated _______ . . . the University provided [the reporter] the written consent form for _______ to sign. Shortly thereafter, [the reporter] informed the University that _______ would not sign the consent. Nonetheless, [the reporter] wished to proceed with the article and again provided the University an opportunity to respond. Given the seriousness of _______'s charges, the University reasonably could assume it would be harmed if it did not answer them.

Mr. Anselmi then stated that "neither the public nor the University's interest are served by an article that reports only the student's allegations of wrongdoing." He also stated that the University sought to obtain the student's consent, but that she refused. He contended that:

> [c]learly, _______ cannot be permitted to charge the University in a public forum with serious misconduct and then, knowingly and intentionally, seek to deprive the University from using the very information it needs to defend itself. Fairness required that the University be permitted to respond without _______ consent; accordingly, finding a waiver of the right to consent in these circumstances is entirely appropriate and fully supported.

Mr. Anselmi stated that the information from Ms._______'s education records that was disclosed was directly and solely limited to that information that was necessary to respond to the charges made to [the reporter] by Ms. _______. He further stated that [the reporter] was not permitted to view nor was she provided copies of Ms._______'s education records, but that he did reference the education records to refute the charges that Ms. _______ made to [the newspaper].

Mr. Anselmi provided this Office with a copy of his _______ letter to [the reporter] in which he provided her with a consent form for Ms. _______ to sign. Mr. Anselmi also provided [the reporter] with a copy of the Department's February 19, 1997 letter to Johns Hopkins University (which he refers to as the "Ruling") and stated:

> While I believe the Ruling applies to the_______ allegations, it is always best to obtain a student's written consent; accordingly, I would appreciate you having Ms. _______ execute the attached original before we speak on Friday morning. . . [I]f Ms. _______ elects not to sign the Consent, I will rely on the Ruling in our discussions.

The consent form, a copy of which he also provided this Office, states:

> I, _______, consent to the release, inspection, copying or other disclosure, including the discussion of, any and all student records (whether academic, disciplinary, financial, scholarship, degree or otherwise) to [the reporter] or other journalists employed by [the newspaper], or parties associated with that paper, in connection with their review and report on recent allegations I made against Towson University. This authorization may only be revoked by a subsequent writing signed by me, and any person or entity presented with an original or copy of this authorization shall be duty bound promptly to release the information referred to above.

The consent includes a signature line for Ms. _______ to sign her name.

DISCUSSION

FERPA generally prohibits the nonconsensual disclosure of education records. The term "education records" is defined as those records which contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR section 99.3 "Education records." "Disclosure" means to permit access to or the release, transfer or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means. 34 CFR ' 99.3 "Disclosure."

FERPA generally requires that a student provide written consent before an educational agency or institution discloses a student's education records. 20 U.S.C. section 1232g(b); 34 CFR section 99.30 and 99.31. While there are several statutory exceptions to the written consent provision, none permits the nonconsensual disclosure in circumstances such as the subject of this complaint. 20 U.S.C. section 1232g(b); 34 CFR section 99.31. Moreover, neither the statute nor the regulations specifically permit an educational agency or institution to infer an implied waiver of the right to consent.

As Mr. Anselmi referenced in his letter, the Department stated in the "Analysis of Comments and Changes" section of the November 21, 1996 publication of the FERPA Final Rule issued to implement certain changes made to FERPA by the Improving America's Schools Act of 1994 that this Office has a policy of permitting a school to infer an implied waiver of the right to consent to disclosures of information from education records if the parent or student has sued the institution. The rationale for this policy is based on the belief that a student or parent should not be permitted to use rights afforded them under FERPA to prevent an educational agency or institution from defending itself in a court of law when the parent or student has initiated legal action and seeks damages against the agency or institution. In such circumstances, the educational agency or institution must be able to defend itself. The Department has maintained a consistent position on this issue, and advises educational institutions that any disclosure of personally identifiable information from a student's education records to a court of law in response to a lawsuit filed against the institution by the student must be limited to that information necessary to defend itself against the specific charges made.

Mr. Anselmi also correctly notes in his letter that this Office extended its policy permitting educational agencies and institutions to infer an implied waiver of the right to consent in other specific circumstances. However, the policy was extended based on the narrow set of facts present in that particular case, although our February 14, 1997, finding did not explicitly state this. In that case, a student copied his letter to a dean at Johns Hopkins University in which he had made allegations concerning Johns Hopkins University and a professor therein to his then employer, the National Cancer Institute (NCI). The dean responded to the student's letter, and sent a copy of the response to NCI, which was an organization with which Johns Hopkins has a special grantor-grantee relationship. The student requested that NCI, based on his allegations, take a particular action to assist him outside Johns Hopkins, and Johns Hopkins disclosed the information believing that, as such, NCI should be fully aware of the facts and have information from the perspective of Johns Hopkins on the matter.

In an August 14, 1995, letter, this Office issued its finding that Johns Hopkins had violated FERPA as alleged, based on the policy of this Office to permit a school to infer an implied waiver of the right to consent only in limited situations, specifically where a student files a lawsuit against a school and a school cannot defend itself without reference to information from the student's education records. In so doing, this Office took into consideration the fact that NCI was not rendering a decision affecting Johns Hopkins based on the student's allegations. In a July 10, 1996, letter, Johns Hopkins requested that this Office reconsider the complaint and our policy of allowing a school to infer an implied waiver of the right to consent in extremely limited circumstances. We did so, and as a result issued the February 14, 1997, finding in which we stated:

> Based on the additional information provided by the University in its July 10 letter, we have determined that this complaint is analogous to an educational institution inferring a student's implied waiver of the right to consent to the release of information from his education records when the student has sued the institution. In both instances, the student had requested the involvement of an entity outside of the institution, and it is logical and appropriate that the institution would respond on the record.
>
> Therefore, we believe that if a student has taken an adversarial position against an institution, made written allegations of wrongdoing against the institution, and shared this information with third parties, the institution must be able to defend itself. In order to defend itself, it would be difficult for an institution to provide a response without referring to the student's education records.

While the policy statement made in the Johns Hopkins finding was general and suited toward a broad application, the extension of the policy on implied waiver of the right to consent was based on a narrow set of facts. In retrospect, this Office believes that it should have more clearly delineated guidelines in the Johns Hopkins ruling that would have better clarified those situations, other than those in which the student has sued the agency or institution, where it is appropriate for an educational agency or institution to infer an implied waiver of the right to consent. We therefore set forth clearer guidelines in this decision today. However, we also wish to emphasize that any educational agency or institution that faces a question about disclosure with respect to an implied waiver of the right to consent should contact this Office with details about the particular situation it is facing for guidance before the agency or institution releases any education records.

As a matter of clarification of the Department's policy on permitting an educational agency or institution to infer an implied waiver of the right to consent to disclosure of personally identifiable information from a student's education records in a non-litigation context, we offer the following guidelines:

> The Department will support an educational agency or institution that has inferred an implied waiver of the student's right to consent to disclosure when:

1. the student has taken an adversarial position against the educational agency or institution;

2. the student has initiated the involvement of the third party by contacting that party in writing, and, in so doing:

   a) set forth specific allegations against the educational agency or institution; and,

   b) requested that action be taken against the educational agency or institution or that the third party assist the student in circumventing decisions made about the student by the educational agency or institution;

3. the third party's special relationship with the educational agency or institution:

   a) gives the third party authority to take specific action against the educational agency or institution; or,

   b) reasonably could be significantly adversely affected if the educational agency or institution cannot refute the allegations; and

4. the disclosure is as limited as is necessary for the educational agency or institution adequately to defend itself from the student's charges or complaint. The third party should follow the procedures set forth in 34 CFR § 99.33 on limitations that apply to the redisclosure of information derived from education records.

In formulating and establishing a policy that is not directly addressed by FERPA and is being implied, the Department seeks to ensure that the basis for such policy is strong enough to outweigh the potential harm. In this circumstance, the strong policy consideration behind the waiver of the right to consent doctrine is that an educational agency or institution should be able to defend itself against an adversarial position that has been taken against it by a student where the student has shared this information in writing with a third party that has a special relationship with the educational agency or institution in a way that could significantly adversely affect the educational agency or institution. The potential harm is the dissemination of personally identifiable information from education records without the appropriate written consent. The above guidelines are our effort to minimize the harm, while at the same time to protect the strong policy consideration that gives rise to the doctrine of the waiver of the right to consent.

The widespread dissemination that occurred with Ms.________'s records is not permissible under the implied waiver of the right to consent for two reasons. First, the harm to Ms.________ from the disclosure to the [the newspaper] was too great. In this respect, the harm to the student differs from a disclosure in a lawsuit or a disclosure to a discrete third party that has a special relationship with the educational agency or institution and has been asked by the student to assist the student in an adversarial situation with the educational agency or institution. With respect to the University's disclosure to the [the newspaper], there can be no effective limitation on the widespread dissemination of the information from Ms. ________ education records. Unlike a situation where the student has sued the school, the student cannot seek an order of protection from further disclosure when a school has disclosed records to the general public. Similarly, unlike a situation where information is disclosed to a discrete third party that has a special relationship with the educational agency or institution and has been asked by the student to assist the student in an adversarial situation against the educational agency or institution, the disclosure of information in this case was to the general public, and there can be no limitation on redisclosure. The harm to the student's privacy interest under FERPA is simply too great where the disclosure of personally identifiable information in education records is to the general public.

Second, unlike situations in which an educational agency or institution would be unable to defend itself in litigation brought by the student, or in which the educational agency or institution's special relationship with a third party could be significantly adversely affected, or the third party might take specific action against the educational agency or institution unless the agency or institution could refute the charges made against it by the student, the media and the general public cannot take such specific actions. Nothing in FERPA prevents an educational agency or institution from responding to a request for information or an interview with a statement to the effect that FERPA prohibits the disclosure of information from the student's education records which would be necessary to respond. If information is published which is inaccurate and misleading, FERPA does not prohibit an

With regard to Mr. Anselmi's assertion that Ms.________'s history of writing third parties with her allegations against the University "weakens her claim to confidentiality," FERPA does not protect the confidentiality of information, per se. Rather, FERPA affords students a right to privacy of information contained in their education records, in particular, the right to consent to most disclosures of personally identifiable information derived from their education records. With respect to Mr. Anselmi's reference to previous occasions where Ms. _______ sought the involvement of third parties with respect to her complaints against the University, it is possible that some of those sets of circumstances would have met the criteria for inferring an implied waiver of the right to consent, as outlined above. However, because any such disclosures by the University that may have occurred in such instances where Ms._______ contacted other third parties regarding her complaints against the University are not subject to the investigation of this complaint, further comment or analysis of such circumstances is immaterial to this letter of finding.

Finally, with regard to the consent which Mr. Anselmi drafted and provided to [the reporter] for Ms._______, FERPA requires that a student's consent for disclosure of education records must:

1. Specify the records that may be disclosed;
2. State the purpose of the disclosure; and
3. Identify the party or class of parties to whom the disclosure may be made.

The consent must also be signed and dated.

The consent prepared for Ms. ________'s signature appropriately specified the records that could be disclosed, stated the purpose of disclosure and identified the parties to whom the disclosure could be made. However, we note that FERPA does not require that an educational agency or institution disclose education records when a student has consented to the disclosure, as implied by the last sentence of the consent that Mr. Anselmi drafted. We further note that should a student revoke consent, such action would not affect disclosures made prior to the date the student does so.

FINDING

While Mr. Anselmi stated that he neither permitted [the reporter] to review Ms. ________'s records nor sent [the reporter] copies of them, Mr. Anselmi orally disclosed information from Ms. _______ 'education records to [the reporter]. In so doing, the University assumed that an implied waiver of Ms. _______' right to consent to disclosures from her education records could be inferred. We find that this assumption incorrectly went beyond the limited scope of those circumstances in which such an inference is appropriate. We find this because Ms._______ had not sued the University and because the disclosure was not to a third party with a special relationship with the University that would allow the third party to take specific action against the University. Also, we do not believe that [the newspaper] and the University's relationship would have been significantly adversely affected had the University not refuted Ms. ________'s allegations.

However, in recognition of the facts that the University met the three prongs of the test that we set forth in our February 14, 1997, finding involving Johns Hopkins University and that our guidance on the special relationship prong of the doctrine of implied waiver of the right to consent under FERPA did not clearly delineate that the rule was based on the narrow set of facts present in that case, we do not find that the University committed a FERPA violation. However, we set forth clearer guidance today and encourage University officials to contact this Office for technical assistance, prior to the release of education records without the student's written consent, when guidance is needed in applying FERPA to a particular set of facts.

ALLEGATION 2

Ms. _______ alleged that the University violated her rights under FERPA when it failed to provide her access to her education records within 45 days. Specifically, Ms. _______ alleged that Dr. Frederick Arnold informed her on December 19, 1997, that "there was hardly anything left in [her] file" and that while she could have copies of her own letters regarding her appeals, "Mr. Anselmi would not let [her] have the information that was presented before the Graduate Studies Committee that was presented by 'the other side' because that was considered privileged."

In our February 18, 1998 letter to the University, we set forth the position of this Office on permitting an educational agency or institution to deny a student access to education records that are subject to the attorney-client privilege and we asked that the University provide specific information for each document Ms. _______ had been denied based on that privilege. Our analysis of Ms. ________'s allegation that she has been denied access to her education records is considered in two parts C records subject to her general allegation and records which the University claims are protected by the attorney-client privilege.

Records Subject to General Allegation

Mr. Anselmi explained in his response the following:

> Dr. Arnold, Associate Dean of the Graduate School, recalls that Ms. _______ called him on December 16, 1997 and made a request to "look at her file." Dr. Arnold informed [her] of the information typically maintained by the Graduate School on former students. Dr. Arnold did not tell [her] she could not have access to certain information. Rather, to avoid misunderstanding regarding her request, Dr. Arnold asked [her] to put her request in writing identifying the information she wished to see. Ms. _______, however, continued to call Dr. Arnold, and each time she called he asked that she put her request in writing. On December 23, 1998, [she] did so. . . . That letter requested "a copy of all [her] undergraduate and graduate student records," including "(academic, disciplinary, financial, scholarship, degree, or otherwise)."

Mr. Anselmi explained that after a series of contact between the University and Ms._______, the University "express mailed to Ms. _______ the records she requested" on January 30, 1998.

By letter dated March 12, 1998, Ms. _______ alleged that she had not been provided access to "copies of audiograms done at [the University] on campus Speech and Hearing Clinic." She stated that "these audiograms would document [her] hearing over [a] long period of time." She stated that in response to a phone call to his office regarding these records, Mr. Anselmi wrote her a February 23, 1998 letter but that he did not provide her with the audiograms. She provided a copy of the February 23, 1998 letter, which does not appear to address her request for access to the audiograms. She also provided a copy of a February 20, 1998 summary of the questions Ms. _______ raised in her telephone call. Item one on that list is that Ms. _______ "wants to know if the University has copies of the audiograms that were performed on her here at the University, and, if so, would like copies of them."

Finally, by letter dated April 27, 1998, Mr. Anselmi wrote this Office and explained the following:

> In preparing the University's response to the above complaint, the University conducted an extensive and thorough search of all University records that pertain to Ms. _______. Because of Ms. _______'s 10-year history of filing complaints against the University, several files were established in a number of different University departments. To assure that Ms. _______ has received all the documents to which she is entitled, my administrative assistant and I personally reviewed each file and every University record relating or pertaining to Ms. ________. This review resulted in the identification of certain documents that may not

have been disclosed to Ms. _______. The University mailed these documents to Ms. _______ and the attached letter.

In his April 27, 1998 letter to Ms. _______, a copy of which he provided to this Office, Mr. Anselmi stated:

> After we expressed mailed the records to you on January 28, 1998, my assistant and I again reviewed University records to prepare a response to the complaint you filed with the Department of Education. To assure completeness, I am providing you these additional documents. While you may have received some of these documents, and some may be duplicates, there are documents included in this response that inadvertently may not have been provided to you in the University's January 28, 1998, response.

In order for this Office to make a determination as to whether the University fully complied with FERPA with respect to Ms. _______'s request for access, we will need additional information from you. In particular, please advise this Office whether the University maintains "copies of audiograms" completed on Ms. _______, and if so, whether (and when) she was provided access to them. Additionally, we will need clarification as to whether the University believes that the copies of records sent to Ms. _______ on April 27 definitely included records that had not previously been provided to Ms. _______ in compliance with her December 1997 request for access. We are also requesting that Ms. _______ provide additional information relative to this allegation (see copy of enclosed letter to Ms. _______).

Records for which the University Has Claimed Attorney-Client Privilege

Finally, in Mr. Anselmi's March 27, 1998 response to the complaint, he explains that the University denied Ms. _______ access to 12 documents on the grounds that the documents are covered by the attorney-client privilege. He explains that for each document, the privilege is held by Towson State University, the communication is between the University and its attorney (himself) for the purpose of obtaining a legal opinion or legal services and not for the purpose of committing an illegal act or tort, and the communication is confidential and the privilege has not been waived. He identified the documents as:

- Letter dated September 29, 1987 from Michael A. Anselmi to Dr. Vic S. Gladstone regarding Complaint of _______ confirming their previous discussions and requesting information needed for legal advice.

- Letter dated October 13, 1987 from Bill L. Wallace, Ph.D. to Mr. Michael A. Anselmi regarding Complaint of _______ providing the information requested in the September 29, 1987 letter above.

- Letter dated March 31, 1988 from Michael A. Anselmi to Bill L. Wallace, Ph.D. regarding Complaint of _______ requesting additional information needed for legal advice.

- Letter dated April 7, 1988 from Bill L. Wallace, Ph.D. to Mr. Michael A. Anselmi regarding Complaint of _______ in response to Mr. Anselmi's March 31, 1988 letter.

- Letter dated July 25, 1988 from Bill L. Wallace, Ph.D. to Mr. Michael A. Anselmi regarding Complaint of _______ requesting legal advice on Complainant's allegations.

- Memorandum dated March 13, 1990 from Dr. Vic. S. Gladstone to Michael A. Anselmi providing information needed for legal advice.

- Memorandum dated May 18, 1990 from Dr. Vic S. Gladstone to Michael A. Anselmi requesting legal review of letter dated May 18, 1990 to Clinical Certification Board.

- Memorandum dated May 18, 1990 from Michael A. Anselmi to Vic Gladstone advising him that Ms. _______ threatened litigation and providing legal advice on University obligations.

- Memorandum dated May 17, 1990 from Michael A. Anselmi to Vic Gladstone regarding Complaint of _______ and commenting on letter dated May 15, 1990 from Peter Taliaferro.

- Memorandum dated May 4, 1990 from Michael A. Anselmi to Vic Gladstone regarding draft letter prepared by Mr. Anselmi for Dr. Gladstone's review and signature.

- Memorandum dated March 22, 1990 from Michael A. Anselmi to Dr. Vic Gladstone regarding University's legal position on _______'s request for certification.

- Memoranda dated May 16, 1990, May 10, 1990 and May 16, 1990 from Michael A. Anselmi to his file regarding discussion with Dr. Gladstone and Ms. _______'s attorney on the legal obligations, if any, that Dr. Gladstone may have to complete certification forms.

As discussed in our February 18, 1998, letter, FERPA requires educational agencies and institutions to provide eligible students an opportunity to inspect and review their education records within 45 days of receipt of a request. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10(a). As noted above, FERPA broadly defines the term "education records." 20 U.S.C. § 1232g(a)(4)(A); 3 34 CFR § 99.3 "Education records." While FERPA does exempt certain types of records from the definition of education records, neither the statute nor the implementing regulations specifically provides for denying a student's right to inspect and review an education record based on attorney-client privilege or work product privilege grounds. Nonetheless, an educational institution may deny a request to inspect and review on these grounds in certain circumstances. In particular, an educational institution's ability under FERPA to assert the privilege against a student seeking access to education records may be inferred by the institution's need to obtain confidential legal advice in certain circumstances. That is, when an educational institution needs to obtain confidential legal advice, and in so doing creates "education records," the institution may decline to permit inspection and review of those records, or portions of those records, on attorney-client privilege grounds, provided that all of the below conditions are met. In order for an attorney to invoke the attorney-client privilege for his client, he or she must establish that:

1. the asserted holder of the privilege is or sought to become a client;
2. the communication is between a client and a member of the bar, or his or her subordinate, who is acting as a lawyer in connection with the communication;
3. the communication relates to facts disclosed by the client to the attorney for the purpose of securing either an opinion of law or legal services, and not for the purpose of committing an illegal act or tort;
4. the communication is in fact confidential and not made in the presence of anyone outside the particular attorney-client relationship; and
5. the privilege has been claimed and not waived.

After reviewing the above-delineated information about the letters in question, this Office has determined that the letters are Ms. ________'s education records. However, the University has provided this Office with facts showing that each of the above-delineated requirements for invoking attorney-client privilege has been met with regard to each of the identified documents. This Office finds that the University did not violate FERPA when it withheld from Ms. _______ those education records of hers which are subject to the attorney-client privilege, and, accordingly, this Office is closing its investigation of this aspect of this allegation. Consequently, the University will not be required to provide Ms. _______ with access to these documents.

Thank you for your continued cooperation with regard to the investigation of this complaint. Please provide the additional information requested under the general discussion of allegation two within three weeks of your receipt of this letter.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

Enclosure

cc:
Ms. ________
Mr. Michael A. Anselmi

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

April 19, 1993

Mr. Daniel R. Boehmer
Vice President, Servicing
Student Loan Marketing Association
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007-3871

Dear Mr. Boehmer:

This is in follow-up to our meeting on January 12, 1993, and your subsequent letter of January 13, 1993. You have inquired whether release of personally identifiable information from student education records to a proposed student loan "Clearinghouse" would violate the Family Educational Rights and Privacy Act (FERPA). It is our understanding that the Clearinghouse would be established as an independent, not-for-profit corporation by a broad group of lenders, guaranty agencies and secondary markets participating in the Federal Family Education Loan Program (FFELP) to provide a central depository for information on the enrollment status of student borrowers. The Clearinghouse will enter into agreements with postsecondary educational institutions pursuant to which the institution will designate the Clearinghouse as its agent for the purpose of satisfying the institution's obligations under the FFELP to report information on the enrollment status of student borrowers to lenders and guaranty agencies. It is expected that the Clearinghouse will eventually provide this information directly to the National Student Loan Data System.

Under the proposed structure, the Clearinghouse will maintain an enrollment list containing the student's 1) name; 2) Social Security number; 3) enrollment status; 4) date of status change; and other data required to be disclosed under the FFELP regulations. In order for the Clearinghouse to provide current and accurate information on students' enrollment status to lenders, guaranty agencies, and the Department, it is necessary that participating educational institutions provide this information to the Clearinghouse on all of their students, not just those known by the institution to have applied for or received Federal financial assistance. The reason is that a guaranty agency or lender sends a student status confirmation report only to the educational institution identified in the student's application for aid. When a student transfers from the school that first awarded the student financial aid, or enrolls in a new school after having already entered loan repayment status, the second school often has no knowledge of the student's prior financial aid history. As a result, the guaranty agency or lender does not ask for, and the second school does not report, the current enrollment status of that student. Many of these students fail to obtain deferments on their loans and enter into default status without being located.

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The information provided to the Clearinghouse will be obtained from the student's education records. See 20 U.S.C. §1232g (a) (4) (A); 34 CFR §99.3 ("Education records"). FERPA generally prevents a postsecondary educational institution from disclosing information from an education record without the student's prior written consent. 20 U.S.C. §1232g (b)(1); 34 CFR §99.30. One of the specified exceptions to this general rule provides for non-consensual disclosure of information from education records "in connection with a student's application for or receipt of, financial aid." 20 U.S.C. §1232g (g)(1)(D); 34 CFR §99.31 (a) (4). While this specific exception would clearly permit non-consensual disclosure of information to the Clearinghouse of records on students who had applied for or received financial aid, it would not permit disclosure of education records, or information from education records, about students who had not applied for or received financial aid.

However, nothing in FERPA prevents an educational institution from contracting with a person or entity outside the institution to perform services that the institution would otherwise provide for itself. As described above, it appears that the Clearinghouse will be established and operated to perform for educational institutions the reporting of student enrollment status that these institutions are otherwise required to perform under the FFELP. A guaranty agency or lender may ask any educational institution that participates in the FFELP for confirmation of student status, and the institution must search all of its education records in order to respond completely and accurately to that request. We believe that nothing in FERPA prevents an educational institution from entering into an agreement with the Clearinghouse to perform this service for it. Therefore, an educational institution subject to FERPA may disclose to the Clearinghouse information about all of its students, both those that applied for financial aid and those that did not, without prior written consent to the extent necessary to enable the Clearinghouse to perform the student status confirmation services it has been retained to provide on behalf of the institution.

The Clearinghouse should note that the definition of "education records" under FERPA includes records, files, documents, and other materials that are maintained by a person acting for the educational institution. This means that records on students maintained by the Clearinghouse would be subject to FERPA, although it is the educational institution that provided them, and not the Clearinghouse, that it is subject to FERPA and liable for any FERPA violations by the Clearinghouse. Before an educational institution enters into this type of agreement, the institution should first be reminded of its record keeping obligations under 34 CFR §99.32. Further, the agreement should provide that the Clearinghouse may use information obtained from an institution's education records only for the specific purposes for which it is provided, that is, to report to guaranty agencies, lenders, and the Department on the enrollment status of students who have applied for or received financial aid. The agreement should specify that the Clearinghouse has no authority to disclose any information about students who have not applied for or received financial aid. The agreement should also specify that, without the prior written consent of each student, the Clearinghouse has no authority to make any other disclosures of any information from education records, whether or not the student applied for or received financial aid.

I trust that the above information is helpful to you. Should you have additional questions or concerns regarding this matter or FERPA in general, feel free to contact me again.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

cc: Mr Wayne E. Becraft
Executive Director
National Association of Collegiate
Registrars and Admissions Officers

Mr. William M. Mackie, Jr.
Chairman
National Council of Higher Education
Loan Programs, Inc.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

July 12, 1995

Mr. Daniel B. Vukmer
McQuaide, Blasko, Schwartz,
Fleming & Faulkner, Inc.
Attorneys at Law
811 University Drive
State College, Pennsylvania 16801-6699

Dear Mr. Vukmer:

This is in response to your April 27, 1995 inquiry to this Office regarding the Family Educational Rights and Privacy Act (FERPA). In your letter, you ask whether a university can contract with a company, which you identified as XYZ Company, to make student grades and education records available to students through a telephone access system. You ask whether a university could disclose education records to the company without specific written consent to the students if: 1) the university's student record policy is "silent as to the disclosure to third parties which provide business services to the university"; 2) the university's student records policy states that education records will be disclosed without student consent to third parties providing business services to the university; or 3) the university's student records policy "defines the terms 'school official' and 'legitimate educational interest' within the policy to include such situations." You also ask whether the university would be precluded from using such a system when the students access the service "through a computer network such as the Internet."

By letter dated June 22, 1995, Ms. Elizabeth B. Heffernan provided this Office additional information regarding your inquiry on behalf of VoiceFX Corporation, the company you referred to as XYZ Company. Ms Heffernan explained that the services to be provided by VoiceFX are:

> . . . designed to allow students to register for classes and to obtain information about their grades and grade point averages through an automated, password-protected telephone system. The services are similar to in-house automated systems that several universities use to provide course registration and grade reporting for their students. VoiceFX similarly provides convenient and cost-effective course registration and grade-reporting services by contract.

Ms. Heffernan further explained that the services provided by VoiceFX are "secure"; that is, "a student must enter his or her social security number and unique personal identification number to register for courses or obtain grade information." She also explained that VoiceFX is currently "developing a secure means of providing such services using a computer network" so that students can access their grades and register for their classes using their personal computers.

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FERPA affords students certain rights with respect to their education records, such as the right to consent to the disclosures of personally identifiable information from education records. FERPA defines "education records" as:

> those records, files, documents, and other materials, which (I) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such an agency or institution. [Emphasis added.]

20 U.S.C. §1232g (a) (4) (A). See also 34 CFR §99.3.

FERPA's privacy protections are extended explicitly to records and materials maintained by persons "acting for" an educational agency or institution. In so doing, FERPA recognizes that educational agencies or institutions do not necessarily perform all operations and services on an in-house basis and, in fact, frequently obtain professional, insurance, and other business services in consultation with individuals, and organizations outside the institution, such as attorneys, accountants and collection agents. Accordingly, a university could contract with an outside business in order to make education records available to the students to whom the records relate. The education records could be disclosed to the business without the prior written consent of the students and the disclosures to the business would not have to be mentioned in the university's student records policy.

Additionally, FERPA specifically exempts from the prior written consent requirement those disclosures of education records that are made to other school officials, such as teachers, within the educational agency or institution in whom the agency or institution is determined to have a legitimate educational interest. 34 CFR 99.31 (a) (1). Section 99.6 (a) (4) of the FERPA regulations requires an educational agency or institution to include in its student records policy a statement indicating whether it has a policy of disclosing personally identifiable information under §99.31 (a) (1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest.

Accordingly, so long as a university has included in its student records policy criteria for determining school officials and legitimate educational interests that are broad enough to encompass officials of a company, such as VoiceFX, which is providing the types of services you and Ms. Heffernan suggest, FERPA would not require the written consent of the student prior to the disclosure to education records to the company. Enclosed for your reference is a copy of a model student records policy which includes sample language for specifying criteria for determining who are school officials and what is a legitimate educational interest.

FERPA establishes certain record-keeping requirements regarding requests for access to and disclosures of education records. In this regard, FERPA states:

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals, agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. . . .

The FERPA regulations further state that an educational agency or institution does not have to keep a record if the request was from or the disclosure was to: 1) the parent or eligible student; 2) a school official within the educational agency or institution who is determined to have a legitimate educational interest; 3) a party with written consent; or 4) a party seeking directory information. 34 CFR §99.32 (d). Thus, if the university has, in its student records policy, established criteria for determining who are school officials and their legitimate educational interests, and the policy is broad enough to include such a company as VoiceFX, the recordation requirement would not apply to disclosures of education records to VoiceFX. However, if this is not the case, and the university is disclosing the records to VoiceFX as a "party acting for" the university, the university should maintain with the education records of each student a recordation of the disclosures to VoiceFX.

The educational agency or institution which releases education records to a third party must comply with FERPA's redisclosure provisions. These provisions are set forth at 34 CFR §99.33. Finally, with regard to your question as to how FERPA might apply differently if the students sought access to grades and registration services through electronic means, such as a computer network, rather than over the telephone, this Office cannot provide specific advice without more detailed information as to how such a system might work. However, the university, at a minimum, should ensure that only the student to whom records relate can access his or her own education records through such a service.

The Office, in administering the law, would investigate any complaint which contains specific allegations of fact giving reasonable cause to believe that an educational agency or institution improperly disclosed information from a student's education records in response to a request for the disclosure received by electronic transmission. Accordingly, the institution should implement any procedures it believes necessary to verify a student's identity before providing a student access to his or her own education records pursuant to a student's request made by telephone or electronic transmission.

I trust that the above information is helpful to you. Should you have additional questions regarding this matter, or FERPA in general, please do not hesitate to contact this Office again.

As stated above, enclosed is a copy of model student records policy. Also enclosed for your reference is a copy of the FERPA regulations. Please note that our current address and telephone number are:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605
(202)250-3887

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance office

Enclosures

cc: Ms. Elizabeth B. Heffernan

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

Ms. Diane Layton
Director of Admissions/Registrar
Shelton State Community College
202 Skyland Boulevard
Tuscaloosa, Alabama 35404

Dear Ms. Layton:

This responds to your February 10, 1997, request for guidance concerning the release of information from a student's education records to the local deputy sheriff who presented a contempt order or warrant for the student's arrest. This office administers the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. section 1232g and 34 CFR Part 99, and is responsible for providing technical assistance on the law to educational agencies and institutions. I apologize for the amount of time it has taken us to respond to your inquiry. Due to the large amount of correspondence this Office receives, we currently have a backlog that we are working to resolve.

You explained in your letter that the deputy sheriff came to your office seeking to locate a student that he wished to arrest on campus. The deputy sheriff presented you with "an order of contempt from a judge's office" for this student and explained that this was the same as "a warrant for the student's arrest." Nonetheless, because student class schedules are not listed as "directory information" at your campus, you declined to release the information and told the deputy sheriff that you would release the information only if he obtained a subpoena. You further advised the deputy sheriff that if he did not want you to notify the student concerning the subpoena that the subpoena should so specify. You asked this Office specifically whether "this order of contempt and . . . warrant for an arrest qualify as a judicial order" for purposes of releasing information to the deputy sheriff without the student's consent under FERPA. You also asked about having subpoenas served on students at school.

As you know, FERPA provides that an educational agency or institution may not disclose personally identifiable information contained in an eligible student's education records without the student's prior written consent except to the extent that FERPA authorizes disclosure without consent. See 34 CFR section 99.31. An institution's record of a student's class schedule constitutes an "education record" subject to FERPA rights and protections.

FERPA authorizes the non-consensual disclosure of information that has been designated as "directory information" in accordance with regulatory requirements. See 34 CFR section

99.31(a)(11). "Directory information" includes information such as a student's name, address, telephone listing, etc., and could include a student's class schedule as information that "would not generally be considered harmful or an invasion of privacy if disclosed." See definition of "directory information" at 34 CFR § 99.3. However, if the institution has not complied with the notice requirements for directory information set forth in 34 CFR § 99.37, then it may not disclose this information without the student's prior written consent.

FERPA also allows the non-consensual disclosure of personally identifiable information from education records if the disclosure is to "comply with a judicial order or lawfully issued subpoena." 34 CFR section 99.31(a)(9)(I). However, the institution must first make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with --

> (A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or
>
> (B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence of the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

34 CFR section 99.31(a)(9)(ii)(emphasis added).

It is our opinion that the order of contempt or arrest warrant from a judge's office, as you described it in your letter, would not meet the requirements for non-consensual disclosure of information from education records as set forth above. It appears from the information you provided that the document was an order of contempt against the student that provided for the student's arrest. The exception for non-consensual disclosure to comply with a "judicial order or lawfully issued subpoena" applies only to orders or subpoenas issued to the institution for the purpose of obtaining information or records in the institution's possession.

First, the institution is not legally required to comply with a judicial order or subpoena issued to or against another party. More importantly, the privacy protections at the heart of FERPA would be severely undercut if institutions could release personally identifiable information from a student's education records on the basis of a judicial order or subpoena that was issued to any party for any purpose, rather than an order directing the institution to release specified education records. Otherwise, the deputy sheriff could present this contempt order and demand to see the education records of any student who might be useful in locating the student to be arrested. We do not interpret FERPA to authorize this broad type of non-consensual disclosure. Rather, FERPA contemplates a specific decision by the court or issuing authority to seek information from an institution's education records and not a generalized grant of authority to compel the release of desired information wherever it may be found. The requirement that institutions make a "reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance" strongly supports the view that Congress intended this provision to apply only to orders directed at the institution for the purpose of obtaining information from education records.

For these reasons, we agree with the advice that you apparently provided to the deputy sheriff regarding what would be needed in order for the institution to release non-directory information without obtaining the student's prior written consent. You are also correct that the institution is relieved of its obligation to notify the eligible student of the order or subpoena in advance of compliance only if the court or other issuing agency has ordered that the existence or contents of the subpoena not be disclosed. See 34 CFR § 99.31(a)(9)(ii)(A) and (B).

Finally, you asked about having subpoenas served on students at school. If a student's class schedule is listed as directory information, it would be permissible to disclose a student's class schedule to the individual serving the subpoena. If not, then the institution would presumably face the same problems in locating a student as occurred in the situation that prompted your inquiry. Note that FERPA does not prohibit the institution from locating a student for a law enforcement officer or anyone else if a staff member happens to know where the student is and, therefore, does not have to release or retrieve the information from an education record, such as the student's recorded class schedule, in order to do so. Otherwise, there is nothing in FERPA that would prevent law enforcement officials or other persons from serving subpoenas on students at school.

I trust that this responds to your concerns and appreciate the opportunity to assist you with these matters. Please do not hesitate to call upon this office again in the future.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

September 20, 1993

Family Educational Rights and
and Privacy Act (FERPA)

This is in response to your _________ letters, received in this office on ________ and ________ and to your letter ______________ regarding allegations that your rights under the Family Educational Rights and Privacy Act (FERPA) had been violated. This Office administers FERPA and is authorized to investigate complaints containing specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred.

FERPA is a Federal law which affords students the right to have access to their education records, the right to have their records amended, and the right to have some control over the disclosure of some information from the records. FERPA generally protects a student's privacy interest in "education records," which are broadly defined as those records, files, documents, and other materials which contain information directly related to a student and which are maintained by an educational agency or institution. FERPA provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining prior written consent of the student. However, there are certain exceptions to the prior written consent requirement.

FERPA was amended in July 1992 to exclude from the definition of "education records" records created and maintained by a campus law enforcement unit for a law enforcement purpose. The amendment neither requires nor prohibits the release of law enforcement unit records, but allows schools to follow their own policies or applicable State law. Accordingly, FERPA no longer prevents a campus law enforcement unit from disclosing to outside parties -- such as the media -- law enforcement unit records, including campus security incident reports, that were created by the campus law enforcement unit for a law enforcement purpose. The Department is in the process of issuing regulations to implement this recent change to the law.

This Office has written Dr. Richard Peck, President, University of New Mexico (University) to advise him of your allegation that the University violated §99.30 of the FERPA regulations when it allowed the unauthorized release of personally identifiable information from your education records. Specifically, we are investigating your allegation that Mr. Brian Polding, Dean of Students, or someone in his office, disclosed information from your education records, to the

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Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation

campus newspaper, the Daily Lobo, and that the Chief of the University Police Department disclosed information from your education records to the Daily Lobo and to the Albuquerque Journal. This Office is also investigating your allegation that Mr. Polding disclosed a letter you wrote to him, as part of your therapy, to the Administrator of the Student Standards and Grievance Committee, who then shared that letter with the committee. However, as explained below, we are not investigating the following allegations:

Allegation

In the letter received by this Office ___________, which clarifies certain aspects of your complaint, you allege that your rights under FERPA were violated when the University Police Department disclosed police report no. ______ to Mr. Polding, who then put the report into your student records.

Discussion

As explained above, FERPA was amended in July 1992 to exclude from the definition of "education records" records created and maintained by a campus law enforcement unit for a law enforcement purpose. Accordingly, FERPA does not apply to the University Police Department record of your concern and, thus, does not prevent the University Police Department from disclosing law enforcement unit records to anyone, including other school officials.

Additionally, FERPA does not require that a school maintain or not maintain particular information in a student's education records. Such decisions are made at the discretion of the school. Therefore, it would not be a violation of FERPA for the Dean of Students to maintain the information of your concern in your student file. Therefore, we are not investigating this allegation.

Allegation

You allege that the editor of the Daily Lobo violated FERPA by disclosing information regarding the police report to your _____________.

Discussion

FERPA was not intended to apply to campus newspapers or records maintained by campus newspapers. Rather, FERPA applies to "education records" maintained by an educational agency or institution. Accordingly, there is no basis for us to investigate this allegation.

Allegation

You allege that on October 20, 1992, you were handed a letter or suspension and debarment from the University by Mr. Polding in the presence of ____________. You state that ______________ ___________________.

Discussion

It is not clear from your allegation whether Mr. Polding disclosed the information contained in the letter by discussing that information ________________. FERPA would not preclude Mr. Polding from handing you a record in the presence of another student. In this regard, you have not presented specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred. Therefore, there is no basis for us to investigate this allegation.

Allegation

You state that the University Police report should be removed from your education records because it contains charges that were dismissed by court order.

Discussion

Under FERPA, students generally have the right to request the amendment of information contained in education records which the student believes to be inaccurate, misleading, or in violation of his or her privacy. It is the responsibility of the student to clearly request amendment of the contested portion of the record. However, a school is not required to amend an education record in accordance with the student's request. The school is required to consider the request and to inform the student of its decision. If the school decides not to amend the record as requested by the student, it must inform the student of its decision and of the student's right to a hearing. If, as a result of this hearing, the school again decides not to amend the record, the student has a right to submit a statement to the record setting forth his or her views regarding the contested record. That statement must remain with the record for as long as the record is maintained.

However, the opportunity to challenge the contents of the education records of a student is not unlimited. FERPA was intended to require only that educational agencies and institutions conform to fair record-keeping practices and not to override the accepted standards and procedures for making academic assessments of a substantive nature. Accordingly, the FERPA amendment provisions may be used to challenge facts that are inaccurately recorded but may not be used to challenge grades, evaluations of a student's behavior or performance, or decisions regarding disciplinary actions or proceedings.

Additionally, as explained above, FERPA does not apply to records created and maintained by a campus law enforcement unit for a law enforcement purpose. Accordingly, any records created and maintained by the University Police Department regarding you would not be subject to FERPA and you could not seek to amend those records.

In your __________, addressed to Mr. Polding, a copy of which you provided this Office, you stated that you wished to challenge the information contained in certain police reports. You reference a State law entitled the Arrest Record Information Act, stating in relevant part:

> Police Report _______ (charge unlawful carrying of a D.W.) This charge has been dismissed and under the Arrest Information Act must be removed from my records . . . Police Report _______ (charge Public Trespass) this charge has been dismissed and under the Arrest Information Act must be removed from my records.

Mr. Robert E. Bienstock, Associate University Counsel, responded to your request by letter _____ _____, in which he addressed the specifics of the State law you cited. Because your ___________ was specific to the Arrest Record Information Act, I suggest you make another request to the University, under FERPA, requesting that the record of your concern be amended. If the University does not respond, or refuses to comply with your request and does not provide you with an opportunity for a hearing to challenge the record, you may contact this Office again, enclosing a copy of your letter of request and a copy of the University's reply.

As explained above, records created and maintained by a campus law enforcement unit are not subject to FERPA. Accordingly, a student cannot seek to amend information contained in law enforcement-unit records. Any challenges in this regard under State law would have to be addressed by a State entity, not the U.S. Department of Education.

Allegation

You allege that the University's Chief of Police gave an interview to a reporter for the Albuquerque Journal in which he disclosed information from "your education record along with confidential hospital records, and false statements."

Discussion

This Office is investigating your allegation that the University's Chief of Police disclosed to the newspaper information from your education records provided to the Police Department by the University. However, as explained above, the University Police Department would not be prohibited by FERPA from disclosing information from law enforcement unit records, that is, information created and maintained by the campus police for law enforcement purposes.

Additionally, we are not investigating your allegation that information from your hospital records was disclosed to the newspaper. FERPA does not apply to records created and maintained by hospitals.

Allegation

You allege that your "forced stay" at the University of New Mexico Mental Health Center and Mr. Polding's "further requirement [that you] seek psychiatric care, treatment and testing" is a violation of your rights under FERPA.

Discussion

As explained above, FERPA provides students the right to have access to their education records, the right to have the records amended, and the right to have some control over the disclosure of information from the records. FERPA does not address an educational institution's decision to require a student to seek medical attention. Therefore, no basis exists for this Office to investigate this allegation.

A copy of your letter to Dr. Peck is enclosed. When this Office has had an opportunity to review Dr. Peck's reply to our letter, you will be advised of the next step in the investigation. Please refer to control number ______ in any correspondence regarding the complaint.

I trust that the above adequately explains the scope and limitations of FERPA as it pertains to your concerns that this Office is not investigating. Enclosed for your information is a fact sheet on FERPA.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

cc: Mr. Robert E. Bienstock
Associate University Counsel

UNITED STATES DEPARTMENT OF EDUCATION

February 20, 1995

Mr. James Tarwater
Superintendent
Ocean View School District
17200 Pinehurst Lane
Huntington Beach, California 92647

Complaint No.______
Family Educational Rights
and Privacy Act

Dear Mr. Tarwater:

This is in regard to the complaint filed with this Office by Mr. __________. Mr. __________ alleges that the ______________ District (District) violated his rights under the Family Educational Rights and Privacy Act (FERPA) when it disclosed information from the education records of his son, _________, without his prior written consent to reporters of the _____________ ________________.

We informed you of ___________'s allegation by letter dated October 24, 1994, and you responded to his allegation by letter dated November 14, 1994. In your response, you deny that the District improperly disclosed personally identifiable information from _________'s education record. In your letter, you state:

> The information contained in this article came from a variety of sources, the majority of which were obtained from court declarations. This was possible because Mr. __________ did not seal these declarations at the time of the preliminary injunction held in Federal Court. . . .

Under FERPA, a parent must generally provide written consent prior to the school disclosing personally identifiable information from a child's education records to a third party. However, there are several exceptions to FERPA's prior consent requirement set forth in §99.31 of the FERPA regulations. One such exception, §99.31 (a) (9), allows for nonconsensual disclosure of education records when the disclosure is to comply with a judicial order or lawfully issued subpoena. However, under this exception, the school is required to make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, which enables the parent or student to seek to quash the subpoena or move for a protective order. Once an institution determines that a judicial order or subpoena is valid and makes a reasonable attempt to provide advance notice in sufficient time to allow the parent to take appropriate action, the institution is not responsible for taking any further action to protect the records, including action to protect against redisclosure.

Similarly, a parent or student should not be deprived of the protections afforded by the advanced notice requirement in §99.31 (a) (9) when an institution initiates litigation in which the student's education records may be disclosed in depositions and court proceedings. While it makes no sense to actually require an institution to subpoena its own records, the requirements regarding parental or student notification would be the same. Thus, in disclosing education records in connection with litigation it has initiated, an institution should provide advance notice of the proposed disclosure with sufficient time for the parent or student to take action.

Before this Office can make a finding with respect to this complaint, we need additional information from the District. In your response, you state that the majority of the information contained in the subject article came from court declarations. Please inform us of whether any of the information that appeared in the article was derived from declarations suppled to the court by the District, i.e., from _______'s education records. If so, please advise us of whether the District made a reasonable attempt to notify Mr. _________ that it intended to disclose personally identifiable information from _________'s education records to the court, thus, allowing Mr. __________ an opportunity to take action relative to the District's intentions.

Please provide us with the requested information within two weeks of your receipt of this letter. Thank you for your continued cooperation with regard to this matter.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. ___________

UNITED STATES DEPARTMENT OF EDUCATION

August 21, 1995

Mr. Charles L. Guest
University Counsel
Mississippi State University
P.O. Box 6171
Mississippi State, Mississippi 39762-6171

Dear Mr. Guest:

This is in response to your facsimile inquiry of August 18, 1995, in which you request an opinion from this Office regarding the Family Educational Rights and Privacy Act (FERPA). Specifically, you explain that Mississippi State University (University) received a public records request from the Clarion Ledger newspaper for a copy of a letter of inquiry from the National Collegiate Athletic Association (NCAA) in which student athletes from the University are personally identified. You further explain that the University "released the letter in redacted form, having removed all information which might personally identify a student athlete." The Clarion Ledger has now submitted a written request for the release of the inquiry letter in unredacted form. Accordingly, you ask if FERPA would permit such a release. As you are aware, this Office administers FERPA.

FERPA generally protects a student's privacy interests in "education records." The term "education records" are defined as:

> [T]hose records, files, documents, and other materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a) (4). See also 34 CFR § 99.3 "Education records." Accordingly, an investigative report, letter of inquiry, or other information which is directly related to a student and maintained by an educational agency or institution is an "education record" under FERPA.

FERPA provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining prior written consent of the student. 20 U.S.C. § 1232g(b) (1) and (d). See also 34 CFR § 99.30. FERPA does provide a number of exceptions to the general rule requiring written consent prior to disclosure of personally identifiable information from education records. Those exceptions are outlined under § 99.31 of the FERPA regulations. (See enclosure.) However, there are no exceptions for disclosures of information from education records to the media listed under § 99.31. Therefore, in the situation you describe, FERPA would preclude the disclosure of personally identifiable information from the NCAA's letter of inquiry to The Clarion Ledger unless a student provides written consent prior to the disclosure of his or her personally identifiable information.

I trust that the above information is helpful to you. Should you have any further questions, please do not hesitate to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

October 29, 1993

Mr. Robert E. Bienstock
Associate University Counsel
The University of New Mexico
Scholes Hall 150
Albuquerque, New Mexico 87131-0056

Dear Mr. Bienstock:

This is in response to your letter, dated September 2, 1993, addressed to Ms. Frances Moran, regarding the Family Educational Rights and Privacy Act (FERPA). Your letter was referred to this Office for response because we administer FERPA. Specifically, you ask "at what point in the process of application, acceptance, mailing in a deposit, attendance at orientation sessions, matriculation, and attendance at classes" is a student considered "in attendance" for the purposes of FERPA. In your letter, you also state the following:

> Because we are constantly inundated with requests for communication by parents of student-applicants and admittees, for assistance in making arrangements for orientation, student housing, registration, and the like, and because we prefer to continue communicating with these parents as long as possible in order to assist high school students in making the transition to college, it is imperative that we know precisely when we may no longer communicate to the parents without specific written consent from the students. . . .

As you are aware, FERPA affords parents and eligible students certain rights with respect to the student's education records. When a student has reached the age of 18 or is attending an institution of postsecondary education, the student becomes an "eligible student" and all rights afforded by FERPA transfer from the parent to the student. Prior to that time, all FERPA rights belong to the parents. FERPA defines the term "student" as any individual who is or has been in attendance at an educational agency or institution.

With regard to your specific question as to when a student would be considered "in attendance" for the purposes of FERPA, neither the statute nor the regulations offer guidance which would provide further clarification. Historically, the Department has left it to each institution to determine when a student is considered to be "in attendance" at that particular institution.

However, such a determination should be justified by some reasonable basis of fact. Please note that the Department reserves the right ultimately to conclude whether, as a matter of Federal Law, the facts on which the determination is based are relevant and reasonable and that such determination is applied consistently.

With regard to your concern that the University be able to continue communication with parents for as long as possible, you may wish to consider the following alternative. As you know, FERPA limits an educational agency or institution's ability to release personally identifiable information from a student's education records without the student's prior written consent. However, FERPA also provides certain exceptions to this general limitation on disclosure under section 99.31. One of these exceptions permits a school to disclose information from a student's education records to that student's parent if the student is claimed as a dependent for income tax purposes. Specifically, FERPA states that a school can disclose education records without prior written consent if:

> The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

34 CFR 99.31 (a)(8). While FERPA does not offer guidance on what may be considered adequate documentation of a student's status as a dependent, this Office would support a policy of documenting a student's dependency status by requiring a parent seeking access to his or her child's education records to supply a copy of the parent's most recent Federal income tax form, as was the University's previous policy.

Additionally, nothing in FERPA would preclude a university from requiring students to identify their status at the time of registration or even application for incoming freshmen and transfer students. If an institution elects to adopt such a requirement, we believe that students should be advised of the reason why they are asked about their tax status as dependents and suggest the following or a similar statement to students:

> Under FERPA, the University may disclose to parents information from the education records of a student who is "dependent" under the Federal tax laws without the student's consent. Have you been claimed by your parents as a dependent for Federal tax purposes?

Thereafter, if a parent were to request access to information from a student's education records and those records have been identified as the records of a non-dependent student, the record custodian could then ask that the parent supply a copy of his or her most recent Federal income tax form before access to those records would be given. In this way, the burden on a university of obtaining proof of a student's dependent status from a parent would be removed in many instances and colleges and universities could more readily distinguish those students who are dependent students from those who are not.

I trust that the above information is responsive to your inquiry. Should you have any further questions on FERPA, please feel free to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

March 10, 1999

Dr. Robert Wagoner
Superintendent
Henry County Public Schools
326 South Main Street
Newcastle, Kentucky 40050

Complaint No. _____
Family Educational Rights
and Privacy Act

Dear Dr. Wagoner:

This is to inform you of the finding in the complaint filed with this Office by Mr. _________, attorney, on behalf of Mr. and Mrs._________. Mr._________ alleged that the Henry County Public Schools (District) violated the _________s' rights under the Family Educational Rights and Privacy Act (FERPA) when you disclosed personally identifiable information from ______'s education records to [a newspaper]. By letter dated December 17, 1998, this Office advised you of the allegation and by letter dated January 20, 1999, Mr. _________, attorney, responded on behalf of the District.

As stated in our January 20 letter, Mr. _________ has specifically alleged that:

> On [date], an article appeared in the [newspaper], with the headline, "Student's school plan Falsified. . . ." This article quotes from the Superintendent of the [District] . . . discussing details about [the student], his disability, and his educational successes and failures. Specific information from _________'s records including what his disabilities are, what his placement is, and the fact that he failed second grade, was included in this article. Also included in the article was information about the complaints filed by the [parents] to the U.S. Department of Education and the Kentucky Department of Education. [Emphasis added.]

Mr._________ states that while Mrs._________ "addressed an open meeting of the [District] Board to raise concerns about the District _________'s record policies and [the] way that the District resolves disputes," they did not discuss [their] case specifically.

In his response, Mr. ________ states:

> [W]e can find no connection between any statements or comments by the Superintendent and any personally identifiable information regarding the subject student. In fact, the quotes from the Superintendent consist of an acknowledgment that someone in the District falsified educational records, statements concerning the investigation thereof, a discussion of the teachers' disciplinary action, and comments related to the district's response to the allegations. No quote coming from the Superintendent appeared in the article that was related to the student's personally identifiable information. . . . It is our belief that any such information was provided to the paper by the complainants and by other sources. [Emphasis added.]

Mr. ________ also provided a copy of a January 18, 1999 letter addressed to him from Mr. _____ ____, editor of the [newspaper] from 1996-1998. In that letter, Mr. ________ states that he had found his interview with you "frustrating at times because of [your] inability to answer questions directly about the subject and student in question." He further states that you "would only answer questions directly about the subject in question in terms that related to information that was public knowledge C because the parents had brought it up at a school board meeting." Mr. ________ also said in his letter:

> Dr. ________ was also in the unenviable position of trying to answer specific questions, based on documents I obtained between [the District], the parents, and the state and federal departments of Education, while not answering specifically about this child. . . .
>
> I obtained my story by piecing together the generalities and policies I received from Dr. ________, interviews with the parents, and the correspondence I obtained.

Mr. ________ contends in his letter that the complaint does not contain "specific allegations of fact" and he asks that we require "the complainant's [sic] to delineate succinctly just what they contend the district did to violate FERPA." Mr. ________ also asserts that the complaint is not timely because "such complaints must be submitted to [this] office within 100 days of the alleged violation."

Preliminarily, this Office investigates those timely complaints containing specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred. A complaint is timely if it is submitted to this Office within 180 days of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation. The timeliness requirement is an administrative factor, and, in this regard, the FERPA regulations provide that this Office may extend the time limit for filing a complaint under FERPA if the complainant shows that he or she was prevented by circumstances beyond the complainant's control from submitting the matter within the time limit or for other reasons considered sufficient by the Office.

Nonetheless, with regard to this specific complaint, the complainants were aware of the alleged violation on or about [date], when the article was published, and they contacted this Office with their allegation through their attorney Mr. ________ on August 17, 1998, well within the 180-day time limit. This Office, due to the current backlog and staff limitations, is responsible for any delay in the investigation of this complaint.

With regard to Mr. ________'s assertion that the complaint does not contain specific allegations of fact, please refer to the above-quoted allegation presented to this Office by Mr. ________. This quotation, which was included in our previous letter to you, contains a clear and specific allegation that the District violated FERPA when you disclosed information from ________'s education records to the [newspaper]. Determining whether the information that is presented in the article was information derived from ________'s education records and was disclosed by the District is the essence of this investigation.

Notwithstanding the fact that the allegation presented to this Office contained specific facts, we note the following statements contained in the article. These are offered by way of example, and are not intended to be all-inclusive of the specific information that may have been disclosed by the District to the newspaper. The examples include:

> Wagoner acknowledged that the couple's accusation was true.
>
> * * * * *
>
> Wagoner said the district investigated the ________'s claims and found them to be true.
>
> * * * * *
>
> Wagoner said . . . the altered documents, which included meeting summaries and Individual Education Plans. . . .

FERPA generally prohibits the disclosure of education records, or personally identifiable information from education records, without the prior written consent of a parent. Section 99.3 of the regulations defines the "Personally identifiable information" as information that includes but is not limited to:

a. the student's name;
b. the name of the student's parent or other family member;
c. the address of the student or the student's family;

d. a personal identifier, such as the student's social security number or student number;
e. a list of personal characteristics that would make the student's identity easily traceable; or
f. other information that would make the student's identity easily traceable.

34 CFR 99.3 "Personally identifiable information" (emphasis added). As we previously informed you, FERPA states:

> [A]n educational agency or institution shall obtain a signed and dated written consent . . . before it discloses personally identifiable information from the student's education records.

In addition to being signed and dated, the written consent must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made. 34 CFR section 99.30.

We note that FERPA does not specifically define "easily traceable" and that situations regarding disclosures of information that could be considered easily traceable must be analyzed on a case by case basis. A school needs to take into consideration the types and quantity of information that is being released. Additionally, when a school district discloses information from an education record to a third party, it must take into consideration whether the party who is seeking access to the records has prior knowledge as to the names of the students to whom the records relate or may relate and whether any subsequent parties to whom the information may be further disclosed could ascertain the identities of the students to whom the records relate.

FERPA does permit the nonconsensual disclosure of information from education records in certain limited circumstances. However, none of these circumstances permits nonconsensual disclosure of education records to the public, even if a parent or student has made certain claims in public about the educational agency or institution or certain of its employees or representatives. This restriction applies to educational agencies and institutions even if the information could be obtained from another source. Moreover, verification or confirmation of facts contained in or which constitute education records without prior written consent violates FERPA because it requires disclosure of personally identifiable information from an education record, or at the least, a reliance on information contained in education records.

During the interview with Mr. ________, you confirmed that "the couple's accusation was true." Additionally, you stated in the interview that the District investigated the allegations and that the altered records included meeting summaries and Individualized Education Plans (IEP). Thus, this Office finds that you disclosed information from________'s education records, including the fact that ________ was receiving special education services (i.e., by means of the statement regarding the IEP). Further, even if you did not specifically identify ________ or his parents by name, we find that the information disclosed was easily traceable to ________ given the nature of the information and that it related to a specific complaint about which Mr. ________ had other identifying information. Therefore, this Office finds that the District violated FERPA when you disclosed personally identifiable information from ________'s education records to the local press. The ________ will be so advised of this finding by copy of this letter to their attorney, Mr. ________.

The District expressed in its response that you made an effort to only discuss information that was public knowledge. For future reference, when the District has a media inquiry of this nature, this Office would always advise that the parents provide consent for the disclosure. Accordingly, in a situation where the District receives a request from the media and wishes to respond, the District should indicate that FERPA restricts the disclosure of information from education records, and that in order to discus any details from such records, the parents will have to provide their prior written consent. The District may want to add that it would be free to discuss information from education records after it receives the parents' written consent to do so.

In order to close the investigation of this complaint, we will need assurance from the District that appropriate steps have been taken to prevent disclosures of information from education records in the future, including disclosures to the press. Please provide documentation of those steps along with an explanation as to how appropriate District officials are advised of the requirements of FERPA with respect to disclosure of information from education records.

While not directly a subject of this investigation, we note here that Mr. ________ stated that the District provided him with copies of documents. He did not specify which documents were provided, the date they were provided, nor the name of the school official that provided them. If the documents provided by the District were education records, such as letters to the District from the ________ or from other parties such as the state or federal departments of education regarding the ________, FERPA would prohibit such disclosures absent prior parental consent.

Thank you for your continued cooperation with respect to the investigation of this complaint. Please provide the above-requested assurance within two weeks of your receipt of this letter.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION

April 13, 1995

Dr. William M. Chace
President
Office of the President
Emory University
Atlanta, Georgia 30322

Complaint No. _______
Family Educational Rights and
Privacy Act

Dear Dr. Chace:

This is to advise you of the finding in the complaint Mr. ________ filed with this Office under the Family Educational Rights and Privacy Act (FERPA). Mr. ________ alleged that Emory University (University) violated his rights under FERPA when Mr. Seth Tepfer, Computer Laboratory Coordinator, forwarded to three mailing lists, by electronic mail, a copy of a June 5, 1994, memorandum to Mr. ________ from Dr. Larry Frederick, Director, Academic Computing. The memorandum advised Mr. ________ that he was "Academically Excluded" from the University. By letter, dated February 10, 1995, you were advised of the allegation and by letter, dated March 23, 1995, Ms. Joan C. Grafstein, Assistant General Counsel., responded on behalf of the University.

Ms. Grafstein advised this Office that:

> I have learned [from] the University's Vice Provost for Information Technology, Jim Johnson, that information that Mr. ________ was "Academically Excluded" from the University was inadvertently disclosed by electronic mail to certain former employees of the University's Information Technology Division. . . . [T]his disclosure occurred despite that Division's policy and procedures to prevent such disclosures. The Division, under Mr. Johnson's direction, will use the incident to strengthen its efforts to educate staff about the requirements of FERPA.

She also stated that the information about Mr. ________ was disclosed to the "then-current staff of the Division." She explains that such disclosure was permissible under FERPA's exception to the prior written consent provision which permits disclosures to school officials with legitimate educational interests.

Ms. Grafstein provided with her letter a copy of a March 21, 1995 memorandum to her from Mr. Johnson. Mr. Johnson states:

> Information Technology employees who control access to computer resources such as computer accounts, network services such as the Internet and computer laboratories have a need to know the status of students and employees to determine eligibility for use of those resources. Because of security concerns it is important that certain ITD employees know when someone becomes ineligible for computing services almost immediately.
>
> Mr. Seth Tepfer is manager of the employees who monitor and control access to the several computer laboratories at Emory. On June 6, 1994, he sent a notice to lab employees saying __________ should no longer be allowed in the computer labs because he had been "academically excluded." In the course of notifying employees, Mr. Tepfer sent electronic mail to a list that not only contained the names of current Emory ITD employees, but also several former ITD employees.
>
> * * * * *
>
> We will use the opportunity to remind and continue to inform all ITD employees about F.E.R.P.A., and the University's Policy on the Confidentiality and Release of Information About Students. Further, although I understand Mr. Tepfer's desire to have his laboratory employees able to tell Mr. ________ why he was no longer allowed to use computer resources, in the future we will simply say a student (or former student) is no longer eligible for service and refer them to the appropriate office if they have questions.

Ms. Grafstein provided with her letter a copy of the University's student records policy which states in relevant part:

> Faculty and administrative officers of the University who have a legitimate interest in the material and demonstrate a need to know for purposes reasonably related to the performance of their official duties will be permitted to look over the records of any student.

FERPA generally prohibits the nonconsensual disclosure of education records. The term "education records' is defined as those records which contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records." FERPA generally requires that a student provide written consent before an educational agency or institution discloses information from the student's education records. However, such consent is not required if the disclosure is to other school officials within the educational agency or institution whom the agency or institution has determined to have legitimate educational interests. 34 CFR § 99.31 (a) (1). Additionally, § 99.6 (a) (4) of the FERPA regulations requires an educational agency or institution to include in its student records policy a statement indicating whether it has a policy of disclosing personally identifiable information under § 99.31 (a) (1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest.

This Office has determined that the disclosure of the information regarding Mr. _______ to the then-current employees was permissible because the employees needed to know the information to perform their jobs. However, this Office finds that a violation of FERPA occurred when the information from Mr. _______'s education records was forwarded to former employees without his prior written consent.

We note that Mr. Tepfer advised you in his March 21 memorandum that his office "will use the opportunity to remind and continue to inform all ITD employees" about FERPA. This Office will close the investigation of this complaint upon receipt of assurance that such action has been taken. Please provide this assurance within two weeks of your receipt of this letter.

Thank you for your continued cooperation with respect to the investigation of this complaint.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. _________

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

February 10, 1995

Mr. Hugo Sonnenschein
President
The University of Chicago
5801 South Ellis Avenue
Chicago, Illinois 60637

Complaint No. 0433
Family Educational Rights and
Privacy Act

Dear Mr. Sonnenschein:

This is to inform you of the finding in the complaint filed with this Office against the University of Chicago (University) by Mr. Attorney, an attorney representing Ms. "A," an alumna of the University. By letter dated September 22, 1992, this Office informed Mrs. Hanna Gray, former president of the University, of Mr. Attorney's allegation that the University violated rights afforded students by the Family Educational Rights and Privacy Act (FERPA). Specifically, Mr. Attorney alleged that the University violated § 99.10 of the FERPA regulations when it denied Ms. A the opportunity to inspect and review her education records. The specific documents to which Ms. A is seeking access pertain to her 1987 charge of sexual harassment against Mr. "B," a University faculty member. Ms. A requests access to Mr. B's response to her allegations of sexual harassment, to all the exhibits which he introduced in the proceedings, and to the findings made by the University, and the letter of reprimand issued to Mr. B.

Mr. Richard A. Zansitis, Associate General Counsel, responded on behalf of the University by letter dated November 3, 1992. In his letter, Mr. Zansitis claims that the "investigatory file" relating to the professor falls squarely within the specific statutory exemption of employment records from the definition of education records under 20 U.S.C. §1232g(a) (4) (B) (iii). Mr. Zansitis explained that "[t]he records generated during that investigation were made and maintained in the normal course of the University's business and related exclusively to [the professor's] capacity and conduct as an employee of the University." Mr. Zansitis added that "[a]t no time were any of the records relating to the charge and its investigation placed with any education records of [the student] . . . [and that the] investigatory file has not been available for use for any purpose since that time, except only insofar as it may impact [the professor] as an employee of the University." The University thus argues that, under the express terms of 20 U.S.C. §1232g(a) (4) (B) (iii), these documents are not "education records" of the student and

Ms. A has no right of access to them under FERPA. Mr. Zansitis also drew an analogy to the Department's "consistent policy and practice" regarding the confidentiality of student disciplinary records under FERPA:

> In the case of one student bringing a disciplinary charge against another student, the Department has held that the student bringing the accusation is not entitled under FERPA to review the record of the disciplinary process, since the disciplinary matter only indirectly relates to the student bringing the charge. Rather, since the discipline file directly relates to the student accused, the accused student's privacy and confidentiality rights under FERPA preclude disclosure without the accused student's consent, even to the student bringing the charge.

Mr. Zansitis argued further that:

> [B]ringing a charge is an insufficient basis to transform a record not directly related to the student and not covered by FERPA into an "education record" subject to disclosure.
>
> Moreover, to require disclosure of such confidential investigatory files relating to an employee upon a student's request would significantly hamper a university's ability to investigate and act upon allegations of employee misconduct.

In a November 29, 1993 letter to this Office, Mr. Attorney stated that the materials requested contain information "directly related" to Ms. A and are clearly "maintained" by the University and, as such, he believes that they are "education records" under FERPA, which Ms. A is entitled to inspect and review. In particular, Mr. Attorney claimed that Ms. A's complaint and supporting documentation, the professor's response and supporting documentation, and the reprimand "vindicating her complaint" all "directly relate" to the student and to the professor. In this regard, Mr. Attorney recognized that these documents do not related "exclusively" to Ms. A, but argued that this is not required under the definition of "education records."

In the same letter, Mr. Attorney further argued:

> In this complaint, Ms. A is seeking to review materials which directly relate to her. Some of these materials, such as the complaint itself and her supporting data, originated with her. Some of the materials pertain to the faculty member's response [to] which she and a student assistant were given brief access. These can hardly be considered "confidential" documents. They are statements by the faculty member and his supporting data which purport to controvert her allegations. The University states that the response not only denied that any harassment occurred, but differed quite significantly in its account of the facts

> from [the student's] account. Since this seems to be the case, it is incumbent upon her legal counsel to personally inspect the response and supporting documents before offering legal advice. Since these materials are being maintained by the University, Ms. A should have access to them under FERPA. [Emphasis added.]

In an earlier letter, dated October 12, 1993, Mr. Attorney stated that even if the University's finding and reprimand are determined to pertain exclusively to the professor, "the same rationale should not extend to his response and supporting documentation, which is directly related to Ms. A and her allegations." Mr. Attorney believes nonetheless that the University's findings, recommendation and reprimand are as "directly related" to her as are the complaint, the professor's response, and his supporting documentation. In an April 21, 1993 letter, Mr. Attorney explained that Ms. A's claims that the Provost told her that the University found the professor "guilty of sexual harassment" and that he was issued a written reprimand for his conduct. However, as noted above, the University denied Ms. A's request to examine the written reprimand.

In his November 29 letter, Mr. Attorney stated that he does not agree with the University's response that the records in question are excluded from the definition of education records as the personnel or employment records of the professor. Specifically, Mr. Attorney states that the exclusion in 20 U.S.C. §1232g (a) (4) (B) (iii) does not create a broad "personnel file" exception to the definition of education records. Rather, "it excludes such materials only if they 'related exclusively' to the faculty member and are 'not available' for any other purpose.'"

FERPA provides that an eligible student has the right to "inspect and review" his or her education records. 20 U.S.C. §1232g (a) (1) (A). Both the starting point and the ultimate issue in this discussion is whether the documents that this student asked to review, or some portion of them, are "education records" under FERPA. If so, then Ms. A has the right under FERPA to inspect and review them, unless they fall within one of the four statutory exclusions from the definition of "education records."

FERPA defines the term "education records" as:

> except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which --
>
> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. §1232g (a) (4) (A). Subparagraph (B) excludes, from the term "education records" four categories of records, including:

> (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which related exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose.

20 U.S.C. §1232 g (a) (4) (B)

It is noted that the University does not dispute that these documents exist or that it "maintains" them within the meaning of FERPA. There is also no question for purposes of this discussion that the student who filed the sex harassment complaint is a "student," as that term is defined in FERPA, and that the professor is not, and that the professor is an employee of the University and the student is not. See U.S.C. §1232g (a) (6).

As a threshold matter, we reject as without merit, as we have consistently in the past, the contention that the location in which an institution maintains documents dictates whether they should be considered education records. Specifically, in support of its argument that the documents requested by the student are not "education records," the University asserted that these records were never "placed with any education records" of the student. This argument implies that "education records" means one or more designated places where a student's official records are maintained, such as the office of the registrar or dean, and further that a document becomes an "education record" under FERPA only after it has been placed in this "official" record. This assumption is inaccurate. FERPA broadly defines education records to include any record which is directly related to a student and which a school maintains, no matter where that record is maintained.

Additionally, this office does not agree with the University that the records at issue be viewed as a single and entire file (which it views as either a "personnel" or an "investigatory" file) rather than separate documents that may or may not constitute "education records" under FERPA. Again, the definition of an "education record" is a record that contains information directly related to a student. There is no statutory basis for imposing an "all or nothing" approach to a group of documents, depending on how they are filed or maintained by the institution, for purposes of making this determination. Further, not only should each document be evaluated separately to determine whether it is an education record subject to inspection and review by the student, we believe that in appropriate circumstances, as explained below, various portions of a document may be evaluated to determine which ones, if any, should be subject to inspection and review.

This Office also disagrees with the University's analogy that the records in question are like student disciplinary records, which are not available to the student "accuser" or "victim" apart from specific statutory authorization. The difference between these two types of records is that student disciplinary records are clearly "education records" under FERPA, while employment or personnel records, by definition, are generally not. Thus, the 1990 amendment to FERPA that permits disclosure of the results of disciplinary proceedings to the victim of a crime of violence is not analogous to a case involving employment personnel records.

It should be noted that in this regard the University has misstated the Department's "consistent policy and practice" regarding the confidentiality of student disciplinary records under FERPA. It is true that, in general, "the student bringing the accusation is not entitled under FERPA to review the record of the disciplinary process," as the University stated, but not because "the disciplinary matter only indirectly relates to the student bringing the charge." On the contrary, if documents or parts of a student's disciplinary file contain information directly related to the student victim, then the student victim has the right to inspect and review those portions of the document of record. So long as a document contains information directly related to a student (even if the information in the document was not personally identifiable to the student) the document is an education record under FERPA and a student has a right to inspect and review it.

Ordinarily, an institution is expected to provide access to an entire document, or group of documents, that contains information directly related to a student, and not just the parts that are, in fact, directly related to the student. In other words, FERPA generally enables parents and students to know about the context in which the "directly related" information is maintained, rather than limiting them to viewing only the "directly related" information itself.

We recognize that it may be appropriate in certain circumstances to segregate and remove those parts not directly related to a student to provide the student full access to his or her education records. For instance, FERPA recognizes that there are occasions when a student may wish to inspect and review his or her education records which are also directly related to other students. Full disclosure of those records could result in an improper disclosure. In this regard, FERPA states:

> If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.

20 U.S.C. §1232g (a) (1) (A). This Office believes that this "principle of segregation" may apply with equal force where the institution seeks to protect the records of an employee, rather than the education records of a student. In short, the institution should provide a student with access to all

parts of a document that are directly related to the student, as well as all parts of that document that are not directly related to the student unless those parts are excluded by statute, as are employment and personnel records, and the institution does not want to disclose the records. (The institution is, of course, permitted under FERPA, but not required, to disclose records that do not constitute "education records.")

Although not at issue here, Ms. A's sex harassment complaint and supporting documentation likely contain information directly related to her and therefore, constitute "education records" that she has the right to inspect and review, regardless of where the institution maintains them. There are probably allegations about the professor's conduct directed toward the student; even if the complaint is solely based on a "hostile environment" type of claim, the student's complaint and supporting documentation probably contain specific information about how the harassment affected her personally to create a hostile environment.

Similarly, the professor's response to the complaint, supporting documentation, and some or all of the University's findings may contain information directly related to the student. As outlined above, we believe that Ms. A should have access to all parts of these documents that "directly relate" to her.

The University's reprimand or ultimate sanction, on the other hand, may or may not be "directly related" to Ms. A. For instance, if the reprimand contains an order that the professor stay physically away from the student, that type of information is "directly related" to the student and, therefore, she would have the right to inspect and review it. Otherwise, a determination of whether such reprimand or sanction is directly related to Ms. A should be based on consideration of FERPA's specific statutory exclusion of personnel or employment records from the definition as discussed above.

This Office finds that, at the least, some and parts of some of the records to which Ms. A is seeking access are indeed her education records under FERPA, to which she is entitled the right to inspect and review. This Office, therefore, finds that the University violated FERPA when it denied her access to those records.

In order to resolve this complaint, the University will have to apply the following guidance on a record-by-record basis in order to provide Ms. A with access to the requested records. This opportunity for the University to make the decision is provided so that the University and Ms. A may act in good faith to resolve the issue without necessitating the further specific involvement of this Office.

1. Does the record contain information that is directly related to the student?

FERPA does not require that the records relate "exclusively" to the student, only that they contain information that is "directly related" to the student. Further, any interpretation of the term "directly related to" should take into account that one of the essential purposes of FERPA is to provide parents and students with a right to inspect and review these records. As noted above, an individual should be able to know, review, and challenge all information that an institution keeps on him or her, with certain limited exceptions. Thus, you should give the fullest effect possible to the statutory right to inspect and review education records and read the exemption narrowly.

2. Does the record also contain information that meets the requirements of a personnel or employment record under FERPA?

The so-called personnel records exception to the definition of "education records," quoted above, applies to employees (who are not also students) where the records 1) are made and maintained in the normal course of business; 2) relate exclusively to the employee in his or her capacity as an employee; and 3) are not available for use for any other purpose. 20 U.S.C. §1232g (a) (4) (B) (iii). If the record contains information that satisfies these requirements, then FERPA requires the institution to identify and segregate those portions and permit the student to inspect and review all that remains. In making these determinations, we note that while personnel or employment records are excluded from the definition of education records in specified circumstances, it is not one of the essential purposes of FERPA to protect employment or personnel records. Accordingly, any uncertainties should be resolved in favor of the student, who holds and exercises the right to inspect and review education records for which FERPA was enacted.

Please provide us within four weeks, a written explanation regarding the steps you have taken in order to provide Ms. A full access to her education records. Thank you again for your continued cooperation with regard to this matter.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. Richard A. Zansitis
Mr. Attorney

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

August 14, 1996

Mr. Raymond J. Kuby
Attorney at Law
5812 South Stony Island Avenue
Chicago, IL 60637-2004

Complaint No. 0433
Family Educational Rights
and Privacy Act

Dear Mr. Kuby:

This is in regard to the complaint you filed on behalf of your client, Ms. _______ E. ________ against the University of Chicago (University) under the Family Educational Rights and Privacy Act (FERPA). By letter dated February 10, 1995, this Office advised you and the University of our determination that the University violated FERPA when it denied Ms. ________ the opportunity to view her education records. By letter dated May 13, 1996, we informed you that subsequent cases that have come into this Office necessitated the reevaluation of our February 10 determination.

By letters dated May 16, July 15, and August 1, 1996, you requested a "copy of each of the 'subsequent cases'" that we referred to in our May 13 letter. Our reference to cases may have led you to believe that this Office maintains case histories/legal findings on an issue similar to the substantive nature of this complaint. However, that is not the situation. Instead, a complaint that is pending with this office has caused us to reconsider this issue.

Because of the complex legal questions we must consider, reaching a final resolution in this complaint has taken longer than we anticipated. We realize the length of time that this process has taken and again apologize for any inconvenience.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. Richard A. Zansitis

600 INDEPENDENCE AVE., S.W. WASHINGTON, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

February 12, 1999

Mr. Thomas C. Anderson
Assistant Attorney General
Education Division
Office of the Attorney General
P.O. Box 140853
Salt Lake City, Utah 84114-0863

Dear Mr. Anderson:

This is in response to your January 13, 1999, letter, addressed to Mr. David Berthiaume of the U.S. Department of Education's Office of General Counsel concerning the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99. Your letter enclosed correspondence between you and Ms. Cecelia Foxley, Commissioner of Higher Education (Utah State Board of Regents), and correspondence between Ms. Foxley and Mr. Auston Johnson, Utah State Auditor. You also enclosed a letter from Mr. Terry Livingston, Assistant Regional Inspector General for Audit, U.S. Department of Education, addressed to Mr. Johnson, in which he provided Mr. Johnson's office with some guidance on FERPA. Your letter was referred to this Office for response because we administer FERPA.

The Utah State Auditor has requested disclosure of information from the education records of all Utah postsecondary students for the 1997-98 school year for the purpose of "performing single-audit testwork relating to the Unemployment Insurance Program at the Department of Workforce Services." The information requested includes the following: the student's first and last name; social security number; date of birth; address; full/part-time status; and institution attended. You ask whether FERPA would permit the Utah Board of Regents to disclose the requested information to the State Auditor.

As you are aware, FERPA is a Federal law that protects an eligible student's[1] privacy interest in his or her "education records." In particular, FERPA affords eligible students the right to inspect and review their education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. The term "education records" is broadly defined as:

> [T]hose records, files, documents, and other materials, which (I) contain

---

[1] The rights under FERPA belong to the parents of a student until the student becomes 18 years of age or enters a postsecondary institution (eligible student).

> information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4). *See also* 34 CFR § 99.3 "Education records." FERPA provides that education records, or personally identifiable information from such records, may be disclosed by educational agencies and institutions only after an eligible student provides prior written consent, except in statutorily specified circumstances. 20 U.S.C. § 1232g(b)(1) and (d). *See also* 34 CFR § 99.30.

FERPA generally prohibits the nonconsensual disclosure of information derived from education records, except in certain circumstances. 20 U.S.C. § 1232g(b); 34 CFR § 99.31. Accordingly, if one or more of the exceptions are met, an educational agency or institution may disclose education records, or personally identifiably information from education records, without prior written consent. However, from the information you have provided, and as explained more fully below, it does not appear that any of FERPA's exceptions to the prior written consent provisions would permit the nonconsensual disclosure by the Utah State Board of Regents of personally identifiable information from education records to the State Auditor.

Under one of the exceptions to the prior consent rule, an institution of postsecondary education may disclose information without consent if:

> (3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of --
>
> (iii) State and local educational authorities.

34 CFR § 99.31(a)(3)(iii); see also 20 U.S.C. a§ 1232g(b)(1)(C). According to the requirements of 20 U.S.C. § 1232g(b)(3) and (5) and of 34 CFR § 99.35, paragraph (a), the above representatives may have access to education records in connection with an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to *those programs*.

This Office has previously determined that State auditors may be considered "authorized representatives of State and local educational authorities," but only for the purpose of conducting an audit of an *education* program. Thus, personally identifiable information from student education records can be disclosed to State auditors for such purposes under § 99.31(a)(3) of the FERPA regulations, which implements 20 U.S.C. § 1232g(b)(3) and (5). The Utah State Auditor may have access to personally identifiable information from education records if the information is in connection with the audit of State or federally supported *education* programs. However, the provision in FERPA does not permit the State auditor to have access to personally identifiable information from education records for the purpose of auditing a program that is not an educational one, such as the Unemployment Insurance Program.

Please note that in a February 10, 1999, telephone conversation with Mr. Livingston, Assistant Regional Inspector General at the U.S. Department of Education, Mr. Livingston explained that he had clarified his December 2 advice. Mr. Livingston stated that his letter should have specified that nonconsensual disclosures under FERPA may be made in conjunction with an audit or evaluation of a Federal or State supported education program, rather than "Federal or State supported programs." Moreover, please be advised that the Secretary has designated the Family Policy Compliance Office as the office to administer FERPA. If you have any questions about complying with FERPA, they should be addressed to this Office and we will provide you with a definitive response.

I trust that the above information sufficiently responds to your inquiry. Should you have additional questions regarding this matter, please do not hesitate to contact this Office again. The address and telephone number are as follows:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-4605
(202) 260-3887

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. Auston Johnson
Utah State Auditor

Mr. Ray Lazorchak, Director
National External Audit Review Center
Department of Health and Human Services

Ms. Cecelia Foxley
Commissioner of Higher Education

Mr. Terry Livingston
Assistant Regional Inspector General for Audit
Department of Education

May 1996 Dear Colleague Letter on Campus Security Issues

GEN 96 11

Summary: This letter provides an overview of the regulatory provisions, and guidance to institutions on how to receive technical assistance in administering the campus security regulations, and the Department's enforcement policy regarding them.

Reference: Regulations published April 29, 1994 and June 30, 1995;
Chapter 3 of the Federal Student Financial Aid Handbook.

Dear Colleague:

The purpose of this letter is to provide you with an overview of the campus security regulations and to bring you up to date on various aspects of an institution's administration of them. Originally, the campus security regulations were published in the Federal Register on April 29, 1994 and were effective July 1, 1994. Subsequently, amendments to these regulations were published on June 30, 1995 and became effective on July 31, 1995. These final regulations superseded previous "Dear Colleague Letters" addressing campus security requirements. This letter provides information regarding to whom institutions, parents, and students should address their questions about these regulations, to whom an individual should raise concern about an institution's compliance with the regulations, and how the U.S. Department of Education will respond to allegations of an institution's noncompliance with the campus security regulations.

OVERVIEW

By September 1 of each year, an institution must distribute: (1) to current students and employees: an annual security report containing certain statistics, policies, and a description of programs that promote campus safety and (2) to prospective students and employees: information about the availability of the report, a summary of the report, and an opportunity to request a copy of the report. Examples of what must be included in the report are:

1. Statistics on reports of on campus murders, sex offenses, robberies, aggravated assaults, burglaries, and motor vehicle thefts; and arrests for weapons possession and liquor and drug abuse violations;

2. Policies regarding security, access to campus residences and other facilities, and campus law enforcement;

3. Procedures for reporting crimes and other emergencies;

4. Information on campus sexual assault and rape awareness programs, procedures to follow when a sex offense occurs, disciplinary action procedures, counseling opportunities, and notification to students that the institution will make changes in a victim's academic and living situation if reasonably possible;

5. Policies on the use, possession and sale of alcoholic beverages and illegal drugs; and

6. A description of programs informing the campus community about alcohol and drug abuse education, crime prevention and campus security policies.

With limited exceptions, the regulations do not prescribe policies and procedures for institutions to follow, but rather require that disclosures be made concerning those policies and procedures.

An institution must make timely warning reports to the campus community on certain crimes that represent a continuing threat to students and employees and that were reported to officials with significant responsibility for student and campus activities, campus police, or local police. Campus officials with "significant counseling responsibility," however, are not subject to the timely warning requirement. This exception permits the official to provide confidential assistance to a crime victim, without the competing obligation to provide an immediate report of criminal activity to the campus community. This exception to the timely warning requirement does not apply to the institution's statistical reporting obligations. All officials with significant responsibility for campus and student activities are required to provide information for preparation of the annual statistical report.

FAMILY EDUCATION RIGHTS AND PRIVACY ACT (FERPA)

It has been brought to the Secretary's attention that there is some confusion regarding the interplay of the disclosures required under the Campus Security Act and the prohibitions against the disclosure of information from education records contained in the Family Education Rights and Privacy Act (FERPA). As explained in the preamble to the campus security regulations, FERPA provides no barrier to compliance with the disclosures under the campus security regulations.

Reporting of statistics

The reporting of crime statistics by an institution of the occurrence of crimes on campus does not violate FERPA. FERPA protects the nonconsensual disclosure of personally identifiable information from education records; FERPA does not protect statistical information.

Timely warning provision

FERPA does not preclude an institution's compliance with the timely warning provision of the campus security regulations. FERPA recognizes that information can, in case of an emergency, be released without consent when needed to protect the health and safety of others (34 C.F.R. Sections 99.31(b)(6) & 99.36). In addition, if institutions utilize information from the records of a campus law enforcement unit to issue a timely warning, FERPA is not implicated as those records are not protected by FERPA (20 U.S.C. Section 1232g(a)(4)(B)(ii)).

Informing the accuser and the accused of the outcome of a disciplinary proceeding

The Student Right to Know and Campus Security Act amended FERPA to allow institutions to disclose to the victim of an alleged crime of violence the results of a disciplinary proceeding brought against a student accused of the crime, without the prior consent of the accused. This disclosure is limited to the alleged victim, who should be informed that the information may not be disclosed to the public generally (20 U.S.C. Section 1232g(b)(6)).

Reporting crimes referred to a disciplinary committee.

An institution is not relieved of compliance with the reporting requirements of the campus security regulations when the institution refers a matter to a disciplinary committee, rather than to the institution's law enforcement unit or directly to the local authorities.

TECHNICAL ASSISTANCE

Staff of the Department's Customer Support Branch in the Office of Postsecondary Education are trained to provide technical assistance to institutions in administering campus security regulations. **The telephone number and hours of operation for the Customer Support Branch are 1-800-433-7327, 9:00 a.m. 5:00 p.m. Eastern time, Monday through Friday.** After hours, calls will be accepted by an automated voice response system. Callers leaving their name and telephone number will receive a return call the next business day. You may also fax an inquiry to (202) 260-4199.

The Department's Family Compliance Office is responsible for administering FERPA. An institution with specific questions related to FERPA, needing technical assistance, or desiring to receive in service training may contact the Family Policy Compliance Office, U.S. Department of Education, 600 Independence Avenue, SW, Washington, DC 20202 4605. Additionally, an institution may contact the office by electronic mail at FERPA@ED.GOV or by calling 202-260-3887.

COMPLAINT PROCEDURE

An individual desiring to file a complaint alleging that an institution is not complying with these regulations should contact the Director of the Regional Office that serves the State in which the institution is located. For this and other purposes, I have attached a list of names of Regional Directors, their addresses, and their telephone numbers.

When a complaint is filed against an institution alleging noncompliance with the campus security regulations, the Department will assess the complaint and determine the appropriate response. The Secretary recognizes that the campus security regulations represent new responsibilities for most institutions, and include issues that many will be addressing for the first time. If an institution has difficulties administering a provision of these regulations, the Department will provide technical assistance so that violations can be corrected. If, however, an institution flagrantly or intentionally violates the campus security regulations, or fails to take corrective action, the Secretary will, when appropriate, take action against the institution by imposing sanctions against that institution. The type of sanction will depend upon the severity of the violations; possible sanctions include the assessment of fines, and in very severe violations, the limitation, suspension or termination of the institution from participation in the Title IV, HEA Programs.

The Secretary, with his colleagues in the higher education community, believes that students nationwide must have a safe environment in which to learn, and is committed to ensuring that the Campus Security Act of 1990 is implemented fully by postsecondary institutions.

Sincerely,

David A. Longanecker

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

June 22, 1995

Ms. Judith Horowitz Richter
Office of the General Counsel
University of Maryland Medical Systems
22 South Green Street
Baltimore, Maryland 21201

Dear Ms. Richter:

This is in response to your June 5, 1995 inquiry regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) to the records of medical students. As discussed further below, the records of medical residents are not protected by FERPA.

FERPA generally protects a student's privacy interests in education records. "Education records" are defined as:

> those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

20 U.S.C.§ 1232g (a) (4). The term "student" is defined as "any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records." 34 CFR § 99.3

A medical resident who works at a hospital is not a "student" as that term is defined in FERPA. The individual has received the Doctor of Medicine degree -- the terminal degree for the profession -- from a medical school and has completed his or her education as a "student." In most states, persons who receive a medical degree may not practice medicine without supervision until they have completed a period of residency and passed a State licensing examination. As medical residents, the individuals refine their skills and their work is evaluated for the purpose of determining whether they should be licensed to practice medicine. Evaluative records pertaining to their practical experience as doctors who have completed their education are not "education records" under FERPA. They are not directly related to students in attendance at educational agencies or institutions.

I trust that the above information satisfactorily responds to your inquiry. Should you have further questions regarding this matter, or FERPA in general, please do not hesitate to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

June 22, 1998

Ms. Linda C.T. Simlick
Pinnell & Kingsley,
Attorneys at Law
601 University Avenue, Suite 265
Sacramento, California 95825-6706

Dear Ms. Simlick:

This is in response to your November 25, 1997 letter to this Office and in confirmation of oral advice given to you by a member of my staff on November 21, 1997. You state that your office represents school districts throughout Northern California and you ask whether the Family Educational Rights and Privacy Act (FERPA) would require a school district to obtain a court order confirming that a subpoena has been "lawfully issued." You state that it was your understanding that such action would be required, but that "the question has been raised that if the subpoena is issued in compliance with California law . . . isn't the subpoena then legally sufficient to be defined as 'lawfully issued,' for the purposes of FERPA?" This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions.

FERPA is a Federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information records. When a student turns 18 years of age or attends an institution of postsecondary education, the student becomes an "eligible student" and all FERPA rights transfer to the student. FERPA broadly defines the term "education records" as those records that contain information that is directly related to a student and that are maintained by an educational agency or institution or a party acting for the agency or institution.

FERPA generally provides that an educational agency or institution may only disclose a student's education records to a third party if the parent or eligible student has given appropriate written consent. 20 U.S.C. section 1232g(b)(1) and (b)(2)(A); 34 CFR section 99.30. However, FERPA permits the nonconsensual disclosure of education records in certain limited circumstances, such as when the disclosure is made in compliance with a lawfully issued subpoena or court order if the educational agency or institution makes a "reasonable effort to notify" the parent or eligible student of the order or subpoena in advance of compliance. 34 CFR section 99.31(a)(9)(ii).

While FERPA does not specifically define what constitutes a "lawfully issued subpoena," this

Office has consistently advised that school districts, in consultation with their counsel, are best able to determine whether a subpoena has been lawfully issued because what would be considered a "lawfully issued subpoena" varies from State to State. However, we note that if a subpoena is issued in compliance with State law, it would be "lawfully issued."

In addition, we note that FERPA's requirement that school districts make a reasonable effort to notify parents or eligible students when education records are disclosed pursuant to a subpoena or court order allows the parent or eligible student to seek protective action from the court, such as limiting the scope of the subpoena. Prior attempts to notify are not required when the disclosure is in compliance with a Federal grand jury subpoena or a law enforcement subpoena if a court has concluded, for good cause shown, that the information furnished in response to such subpoena or court order should not be disclosed. 20 U.S.C. section 1232g(b)(1)(J); 34 CFR § 99.31(9)(ii).

Section 99.32 of the FERPA regulations generally requires that an educational agency or institution maintain a record of all requests for access to and disclosures from education records; however, we have determined that such recordation would not be required when the disclosure was made in compliance with a judicial order or subpoena as long as the school successfully notified the parent or eligible student of the order or subpoena in advance of compliance. Further, the recordation requirements at 34 CFR section 99.32 do not apply when disclosure of education records is made in pursuant to a Federal grand jury or law enforcement subpoena if a court concludes that the information furnished in response to the subpoena should not be disclosed to the parent or eligible student.

Additionally, the redisclosure provisions at 34 CFR section 99.33 do not apply to records that have been disclosed pursuant to a court order or lawfully issued subpoena. 34 CFR section 99.33(c). Once an institution determines that the subpoena or judicial order is valid and makes a reasonable attempt to provide advance notice in sufficient time to allow the student to take appropriate action, the institution is not responsible for taking any further action to protect the records against redisclosure.

While a lawfully issued subpoena or court order may compel disclosure of information, FERPA does not require an educational institution to disclose information from a student's education record to anyone other than to the parent of a student to whom the records relate or to the eligible student to whom the records relate. Rather, FERPA permits disclosure of education records without prior written consent in certain limited situations, such as when the records are the subject of a subpoena or court order.

Finally, we have enclosed a copy of the November 21, 1996 final regulations that amended FERPA. The regulations removed section 99.6--the requirement for a student records policy--and revised the annual notification requirements under section 99.7. As a result, school districts must annually notify parents of their FERPA rights, but are no longer required to maintain a student records policy. We are also enclosing a model notification for your review.

I trust that the above information is responsive to your inquiry. Should you have any further questions on FERPA, please feel free to contact this Office again.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

Enclosure

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

February 16, 1999

Dr. Leslie Cochran
President
Youngstown University
One University Plaza
Youngstown, Ohio 44555-0001

Complaint No. _____
Family Educational Rights
And Privacy Act

Dear Dr. Cochran:

This is to advise you of the finding in the complaint filed with this Office by Mr. ________. Mr. ________ alleged that Youngstown University (University) violated his rights under the Family Educational Rights and Privacy Act (FERPA) when it disclosed his education records in compliance with a subpoena which he believes was issued without giving him sufficient notice. This Office advised you of the allegation by letter October 20, 1998, and, by letter dated December 22, 1998, Ms. Sandra L. Denman, General Counsel, responded on behalf of the University.

Specifically, Mr. ________ alleged that the University wrote him on June 3, 1998 to advise him of the subpoena for his education records and then released the records nine days later on June 12. He stated that the letter was received at his post office on June 8. Mr. ________ was out of town on June 8 and did not return until June 16. Nonetheless, he argues that had he been in town on the 8th, he still would not have had sufficient time to move for an order to quash the subpoena in the four days that remained prior to the disclosure of his records. He also alleged that the subpoena was not lawfully issued because it was "served by US Mail without a Certificate of Mailing."

In her response, Ms. Denman explained that the subpoena was lawfully issued and properly served. In this regard, she states that the subpoena was issued in accordance with Federal Rule of Civil Procedure (Fed. R. Civ. P.) 45 in that Ms. ________, the attorney issuing the subpoena, represented the defendant in a civil action pending in a Florida federal court and issued the subpoena out of the federal district court having jurisdiction over the University. She further explains that the subpoena was not served by regular mail and thus a "Certificate of Mailing" was not required. She stated that the subpoena was personally served by a process server, who completed the Affidavit of Service certifying that the subpoena had been served.

Ms. Denman explained that the University was served with the subpoena on June 2, 1998, which requested any and all records that the University maintained on Mr. ________, including but not limited to, his transcript by June 9, 1998. Because the University was required by FERPA to make a reasonable attempt to notify Mr. ________ of the subpoena and to allow him sufficient time to object, the University advised Ms. ________, on June 3, that "the documents would not be produced on the date required by the subpoena." Instead, the University advised that provided "Mr. ________ made no objection . . . the documents would be mailed on June 12th." She states that a letter was sent to Mr. ________ on June 3 notifying him of the subpoena and that "at the end of the day on June 12th, the University had received no objection from Mr. ________, his attorney, or any other counsel of record . . .," so the University mailed the records.

Ms. Denman provided this Office with a copy of the June 3 letter to Mr. ________ from Ms. Laurie L. Miraglia, Legal Assistant. That letter states the following:

> We intend to comply with this subpoena on June 12, 1998 by providing the records requested, to the extent they exist and may be disclosed, to the individual identified in the subpoena. If you wish to object to the release of your records by the University, you or your attorney must file a motion to that effect in the court from which the subpoena was issued. Please send a copy of any such motion to this Office.

FERPA generally requires that prior written consent be provided by an eligible student[1] before education records are disclosed to a third party. 20 U.S.C. § 1232g(b). 34 CFR § 99.30. There are, however, exceptions to the general prohibition on nonconsensual disclosures. One of the exceptions permits the nonconsensual disclosure of education records when the disclosure is made in compliance with a lawfully issued subpoena or court order if the educational agency or institution makes a reasonable attempt to notify the parent or eligible student of the order or subpoena in advance of compliance. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). This notification is intended to give the parent or eligible student sufficient time to move for an order to quash the subpoena.

From the information that the University has submitted to us, we see no evidence to suggest that the subpoena for Mr. ________'s education records was illegally served, as Mr. ________ alleges.

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[1] When a student reaches the age of 18 or attends an institution of postsecondary education, that student is deemed "eligible" and all rights afforded by FERPA transfer from the parents to the student. 20 U.S.C. section 1232g(d); CFR 99.3 "Eligible student."

Mr. ________ claims that:

> . . . the first clue to the fact that the "Subpoena Duces Tecum was flawed" should have been improper service. The document was served by US Mail without a Certificate of Mailing attached, according to the [University]. This is no in accordance with Federal Rules of Civil Procedure and constitutes an invalid service. [Emphasis provided.]

The University explained, however, that the subpoena was personally served by a process server and provided an Affidavit of Service reflecting this. Personal service is a proper means of service.

The University explained, however, that the subpoena was personally served by a process server and provided an Affidavit of Service reflecting this. Personal service is a proper means of service under Fed. R. Civ. P. 45.

Turning to Mr. ________'s allegation that he was not provided sufficient time to move to quash the subpoena, given the totality of the circumstances in this case, we do not find that the University violated FERPA. Mr. ________ asserts that "the normal time to respond to a discovery demand is 30 days." However, under Fed. R. Civ. P. 45, a subpoena duces tecum sets forth a time for compliance (which can be far less than 30 days) for the person who is or the entity that is commanded to produce documents. Further, under Fed. R. Civ. P. 45, there is a maximum of fourteen days after service of the subpoena for the recipient of the subpoena to serve written objections to the subpoena.

FERPA does not define what constitutes sufficient time to allow a parent or eligible student to move to quash a subpoena and this Office has not issued a per se rule on what is a sufficient amount of time in this context. Whether or not a school makes a reasonable attempt to notify a parent or eligible student in advance of compliance with a subpoena is considered on a case-by-case basis. A reasonable attempt to notify can be a letter via the U.S. mail.

Because we consider each complaint on a case-by-case basis, we look at the totality of the circumstances to determine if the time period provided to the eligible student or parent was reasonable. Factors that we will consider include: (a) the time period that an educational agency or institution was given to comply with the subpoena from the date the subpoena was served; (b) whether this time period for compliance was reasonable, considering the urgency of the issuer's need for the subpoenaed documents and the educational agency's obligation under FERPA to attempt to notify the parent or eligible student:[2] (c) whether the educational agency has made a good faith effort under FERPA in its attempt to notify the eligible student or parent of the subpoena in advance of compliance with it;[3] (d) when and how the educational agency attempted to notify the eligible student or parent of the subpoena duces tecum and whether the parent or eligible student was given sufficient time to move for an order to quash the subpoena.

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[2] If we conclude that the time period for compliance was insufficient, then we will look at the efforts made by an educational agency to object to or to move to quash the subpoena in order to allow for a sufficient time to notify the eligible student or parent.

In this case, we note that the University received the subpoena duces tecum in Ohio at 4:00 p.m. on Tuesday, June 2, 1998, and that the subpoena commanded that the University produce documents in Florida within 7 days, that is, by 10:00 a.m. on Tuesday, June 9, 1998. In consideration of the second factor, from the evidence presented to us, the University determined that the time period that the party issuing the subpoena gave to the University to produce Mr. ____ _____'s education records was too limited. As noted above, the University was given less than seven calendar days both to try to notify Mr. ________ (a Florida resident) of the subpoena for his education records and to comply with the subpoena. The University has not presented any evidence to this Office showing why compliance with the subpoena in the seven-day time period was necessary. In looking at the efforts made by the University to object to that time period for compliance, we note that the University requested from the party issuing the subpoena an additional three business days to comply with the subpoena. On June 3, 1998, the University promptly contacted by fax and regular mail the attorney who had issued the subpoena. The University noted that it had received the subpoena and that it had to make a reasonable effort under FERPA to notify Mr. ________ of the subpoena. The University stated that if Mr. ______ __ did not object to the subpoena, then the University would comply with it on Friday, June 12, 1998. Therefore, on June 3, 1998, the University had nine days both to try to notify Mr. _______ and to comply with the subpoena. Although the University could have requested even more time before complying with the subpoena, the University did secure some additional time for compliance.

The evidence shows that the University made a good faith effort to comply with FERPA. On June 3, 1998, the University promptly notified Mr. ________ by US mail that it had been served with a subpoena for his education records. The letter informed Mr. ________ of the University's intention to comply with the subpoena on June 12, 1998. Additionally, it informed Mr. ________ that he could move to quash the subpoena in the court that had issued it.

Finally, turning to the fourth factor, the purpose for which the University was required by FERPA, before complying with the subpoena, to attempt to notify Mr. ________ is so that, in the event that the notification occurred, Mr. ________ would have had sufficient time to move to quash the subpoena. A reasonable attempt to notify Mr. ________ was made by the University when on June 3 it mailed Mr. ________ the letter of notification.

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[3] If an educational agency learns that an eligible student or parent has moved to quash a subpoena dues tecum, the educational agency would not show good faith if it then produced the subpoenaed records without being ordered to do so.

In this case, on Wednesday, June 3, 1998 -- the day after the University had been served with the subpoena -- the University promptly attempted to notify Mr. ________ of the subpoena duces tecum by regular mail and informed Mr. ________ that the University would comply with the subpoena on Friday, June 12, 1998. Assuming that the U.S. Mail would take two or three days, the University reasonably could have expected Mr. ________ to receive the notification by Friday, June 5 or Saturday, June 6, 1998; thus, the University reasonably could have expected that, if Mr. ________ had received the University's notification letter, he would have had six or seven days in which to file an out-of-state motion to quash the subpoena and to notify the University that he had done so. Significantly, Mr. did not contact the University during this time frame. Given these factors, we find this amount of time to be sufficient.

In this regard, Mr. ________ indicates that the University's letter did not arrive until approximately 2:00 p.m. on June 8, 1998. Furthermore, because Mr. ________ was on travel until Tuesday, June 16, 1998, his mail was held at the local post office. There is no evidence that the University knew that Mr. ________ was on travel when it mailed the June 3 letter of notification, and the University is not responsible for Mr. ________'s not receiving his mail between June 8 and June 16. Furthermore, the University cannot be held responsible for the fact that the US mail did not deliver the letter to his address until June 8, thus leaving him four days to move to quash the subpoena should he have been in town. Weighing all of the above factors, this Office finds that the University did not violate FERPA as Mr. ________ has alleged.

Although we do not find that the University violated FERPA in this instance, we encourage educational agencies and institutions to strive to provide a sound and sensible time period to allow a parent or eligible student to take action to quash a subpoena, particularly where a subpoena duces tecum has been issued by a court from a state other than the one in which the parent or eligible student resides. Further, while regular mail is a normal means of notification, we also encourage educational agencies and institutions in an effort to notify students before compliance with a subpoena, to consider using certified mail, telephone, or facsimile as appropriate supplemental means of notification.

Finally, we note that the FERPA regulations were amended in November 1996. The final regulations, a copy of which is enclosed, removed § 99.6 -- the requirement for a student records policy -- and revised the annual notification requirements under § 99.7. This means that while schools must annually notify students currently in attendance of their FERPA rights, they are no longer required to maintain a student records policy. Some of the information required to be in the policy will now appear in the notification. In an effort to assist you with ensuring that the University's notification is in compliance with FERPA, we are enclosing a model notification which meets the new requirements of § 99.7. Additionally, we are closing this complaint and will so notify Mr. ________ by copy of this letter. Thank you for your cooperation with regard to this investigation.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

September 1, 1993

Ms. Eileen Cooke
Executive Director
Washington Office
American Library Association
110 Maryland Avenue, NE
Washington, D.C. 20002-5675

Dear Ms. Cooke:

This is in follow-up to our telephone conversations of last week and my memorandum to you dated August 26, 1993 regarding the Family Educational Rights and Privacy Act (FERPA) as it relates to student theses. As you are aware, the Department was recently asked for a written "formal opinion" as to whether FERPA, also known as the Buckley Amendment, applies to undergraduate and graduate theses and whether such theses could be made publicly available in university libraries for research purposes. The response provided, which stated that student theses would ordinarily be considered education records under FERPA and generally could not be released absent some form of prior written consent by the student, was apparently distributed through electronic mail to institutions around the country and was brought to the attention of the media. Because of the importance of theses for research purposes, the library community became concerned as to whether student theses could be maintained in libraries as research materials without violating FERPA. Below is additional information regarding the Department's position with regard to this issue.

FERPA regulation 34 CFR §99.30 generally requires an educational institution to obtain written consent before releasing a student's education records, or disclosing personally identifiable information from a student's education records, except as provided specifically in 34 CFR §99.31. "Education records" are defined as those records that are --

(1) Directly related to a student; and
(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 CFR §99.3. Generally, any written examination or paper that is prepared by a student and that reveals or discloses the student's identity would be considered an "education record" under this definition (so long as it is maintained by the institution). That is, in ordinary circumstances FERPA prevents an institution from disclosing or publishing a student's written examination or

paper without prior written consent, except in accordance with the specific exceptions set forth in 34 CFR §99.31. This applies equally to the written work of both undergraduate and graduate students.

However, while these documents are clearly "education records," as noted in our May 11, 1993 letter on this subject, we recognize that undergraduate and graduate "theses" often differ in nature from typical student research papers and other education records, such as written examinations, in that they are published or otherwise made available as research sources for the academic community through the institution's library. It has been and remains our understanding that in these circumstances an educational institution would ordinarily have obtained the student's permission to make his or her work available publicly before doing so, perhaps in connection with notifying the student of specific course or program requirements.

Consequently, an institution need not obtain a student's signed and dated specific written consent to disclose or publish a thesis in the library or elsewhere at the institution. Neither the statute, the legislative history, nor the FERPA regulations require institutions to depart from established practices regarding the placement or disclosure of student theses so long as students have been advised in advance that a particular undergraduate or graduate thesis will be made publicly available as part of the curriculum requirements.

I trust that the above information clarifies the Department's position with regard to the applicability of FERPA to undergraduate and graduate student theses. Should you have additional questions regarding this issue, please let me know.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

August 19, 1996

Mr. Terry Roach
Executive Assistant to the President
for Legal Affairs
University of Maryland
2101 Main Administration Building
College Park, Maryland 20742

Dear Mr. Roach:

This is in response to your recent telephone inquiries and subsequent letter of May 29, 1996 regarding the Family Educational Rights and Privacy Act (FERPA) and its application to educational records that are redisclosed by a third party.

In your letter, you explained that the University of Maryland (University), as well as other postsecondary institutions, are required by the National Collegiate Athletic Association (NCAA) to submit investigative reports in connection with an individual student athlete's eligibility to participate in intercollegiate athletics. You stated that the information which the NCAA requires its member institutions to prepare and disclose on its student athletes ranges from grades and course work to the details of misconduct and rules violations.

You also noted that intercollegiate athletics is the object of much media attention and that information contained in reports submitted by universities to the NCAA is frequently requested by the media. You explained that recently, on a number of occasions, sports writers have contacted the NCAA seeking details about particular players. In response to such requests, the NCAA has released "sensitive and identifiable information to the embarrassment of student athletes." Additionally, you provided articles from the *Washington Times*, in which Mr. Jack Kitchen, NCAA attorney, is quoted as stating that FERPA does not apply to the NCAA because the NCAA does not receive Federal funds.

In sum, you ask the Department's Family Policy Compliance Office (FPCO) to confirm that these investigative reports, sometimes referred to as "letters of inquiry," are "education records" under FERPA. Second, you inquire whether the NCAA can publicly redisclose an investigative report submitted to the NCAA by a university without the student's written consent. You also ask whether, if the NCAA publicly discloses information from such reports, FERPA provides any sanctions against the NCAA or the institution.

As you are aware, FERPA protects a student's privacy interest in his or her "education records." The term "education records" is defined as:

600 INDEPENDENCE AVE., S.W. WASHINGTON, D.C. 20202

> [T]hose records, files, documents, and other materials, which (I) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

20. U.S.C. §1232g (a) (4). See also 34 CFR §99.3 "Education records." Accordingly, a letter of inquiry or a report regarding a student athlete in attendance at a university is an education record under FERPA because the letter is directly related to the student (mentions the student-athlete's name) and is maintained by the school.

Addressing your second question, FERPA provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining prior written consent of the student. 20 U.S.C. §1232g (b) (1) and (b) (2) (A). See also §99.30.[1]

Thus, universities may disclose information from the education records of student athletes who sign a copy of the NCAA's Student Athlete Statement (a copy of which you provided). Part II of the form is entitled "Buckley Amendment Consent" which reads:

> By signing this part of the form, you certify that you agree to disclose your education records.

You understand that this entire form and the results of any NCAA drug test you may take are part of your education records. These records are protected by the Family Educational Rights and Privacy Act of 1974, and they may not be disclosed without your consent.

> You give your consent to disclose only to those authorized representatives of this institution, its athletics conference (if any) and the NCAA, the following documents:
>
> * * * * *
>
> ○ Any other papers or information obtained by this institution pertaining to your NCAA eligibility.
>
> You agree to disclose these records only to determine your eligibility for intercollegiate athletics, your eligibility for athletically-related financial aid, for purposes of inclusion in summary institutional information reported to the NCAA

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[1] FERPA does provide a number of exceptions to the general rule requiring written consent prior to disclosure of personally identifiable information. See 34 CFR §99.31.

> (and which may be publicly released by it),[2] for NCAA longitudinal research studies and for activities related to NCAA compliance reviews.

Even when a student has consented to the initial release of his "education records by the institution," FERPA limits the redisclosure of information from education records by third parties that receive such information. Therefore, information from an education record that the NCAA receives from an institution cannot be redisclosed without the student's prior written consent. The statute states:

> . . . [P]ersonal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent . . . of the student.

20 USC §1232g (b) (4) (B). See also 34 CFR § 99.33 (a) (1).

Regarding your question about the sanctions that would occur should an improper redisclosure of information from education records occur, the statute states:

> If a third party outside the educational agency or institution permits access to information in violation of paragraph (2) (A), or fails to destroy information in violation of paragraph (1) (F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

20 U.S.C. § 1232g (b) (4) (B).

The statute directs the Secretary to obtain voluntary compliance from educational institutions and agencies. 20 USC §1232g (f). Among the enforcement options available to the Department if a third party improperly redisclosed information from a student's education records that it received from a particular institution, the Department could prohibit the institution from making further disclosures to that third party for a period of at least five years.[3]

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[2] We note that the NCAA form 95-3a section, "Buckley Amendment Consent," provides that "summary institutional information" may be rereleased by the NCAA. The NCAA's redisclosure of "summary institutional information" is consistent with FERPA because this information refers to statistical compilations, not personally identifiable information from a student's education record.

[3] According to the legislative history from the Improving America's Schools Act (IASA), Congress targeted third parties who receive information from education records from schools without the consent of the student or parent. In particular, the Senate sponsor of the

Finally, we note that FERPA places the initial responsibility on the institution for notifying a third party receiving education records about the restrictions on redisclosure. 20 USC §1232g (b) (4); 34 CFR §99.33 (a) (1). When disclosing information from education records under §99.30 to a third party, such as the NCAA, an educational institution should inform the receiving party that the information may not be further disclosed. This could be accomplished, for example, by informing the third party that "this document contains personally identifiable information from a student's educational record. It is protected by the Family Educational Rights and Privacy Act (20 USC §1232g) and may not be rereleased without the consent of the student" or some alternative phrasing to that effect.

I trust that this is responsive to your inquiry. Should you have further questions, please contact this Office again.

Sincerely,

LeRoy S. Rooker
Directory
Family Policy Compliance Office

IASA amendments, Senator Grassley, stated that third parties have violated the redisclosure provisions for over 20 years. He hoped that his new provision strengthening the penalty for third party redisclosure by requiring that schools not be allowed to disclose information for up to five years would force "organizations . . . to live up to the responsibilities placed in the law since 1974." 140 Cong Rec. S10290 (daily ed. August 2, 1994) (statement of Sen Grassley).

D. ARTICLES

1. "Student Records at Institutions of Postsecondary Education: Selected Issues under the Family Educational Rights and Privacy Act of 1974," by Steven N. Schatken.

2. *Privacy and the Handling of Student Information in the Electronic Networked Environments of Colleges and Universities*, CAUSE (1997 white paper).

3. "The Use of Electronic Data Interchange under the Family Educational Rights and Privacy Act," by Paul T. Rhinehart.

4. "Inaccurate and Misleading: Student Hearing Rights under FERPA," by Thomas R. Baker.

5. "Litigation Involving FERPA," by Ralph D. Mawdsley.

6. "Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974," by T. Page Johnson.

STUDENT RECORDS AT INSTITUTIONS OF POSTSECONDARY EDUCATION: SELECTED ISSUES UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

STEVEN N. SCHATKEN[*]

"Time is the best interpreter of every doubtful law."
—Dionysius of Halicarnassus—

I. Introduction

More than three years have passed since the Family Educational Rights and Privacy Act of 1974 (FERPA) was enacted,[1] time enough to test Dionysius' epigram. Perhaps as with most laws, it is the detail of FERPA, not its basic policies, that Dionysius might find "doubtful", and it is certain of these "doubtful" details that this article discusses. While the discussion is geared to institutions of postsecondary education and their recordkeeping practices under FERPA, many of the issues are pertinent to the other educational agencies and institutions which are subject to the Act.

The basic policies of FERPA are relatively easy to state. The Act applies to most educational agencies and institutions in the United States that have students in attendance.[2] It is intended to protect the privacy of parents and students by giving them a number of substantial rights concerning the students' school records.[3] Parents may exercise these rights until the student is 18 years old or attends an institution of postsecondary education. The student then obtains the rights given under FERPA and the parent may no longer exercise them.[4] Every institution of postsecondary education which has funds made available to it by the U.S. Office of Education must comply with the provisions of FERPA. This includes each component of the institution, whether or not that component is assisted with those funds.[4a]

There are seven major areas of privacy protection provided by FERPA to a student who attends an institution of postsecondary education:[5]

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[*] Chief, Special Services Branch; Education Division, Office of General Counsel; U.S. Department of Health, Education, & Welfare; Washington, D.C. A.B. 1966, Middlebury College. J.D. 1969, University of Wisconsin. This article was written in the author's private capacity. No official support or endorsement by the Department of Health, Education, and Welfare is intended or should be inferred.

[1] General Education Provisions Act, § 438, as added by P.L. 93-380, Title V, § 513, 88 Stat. 571 (Aug. 21, 1974), and amended by P.L. 93-568, § 2, 88 Stat. 1858 (Dec. 31, 1974). FERPA is codified in 20 U.S.C.A. 1232g. All cites to FERPA in this article will be to the codification.

[2] 20 U.S.C.A. 1232g(a)(3) (definition of "educational agency or institution"). See the discussion on the types of agencies and institutions covered under FERPA, at II.A below.

[3] See the remarks of Senator Buckley when he introduced the original version of the Act on the Senate Floor. (120 Cong. Rec. 14579-14582) (1974).

[4] 20 U.S.C.A. 1232g(d).

[4a] 45 C.F.R. 99.3 (definition of "educational agency or institution".)

[5] 20 U.S.C.A. 1232g(a)(1), (a)(2).

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(1) The student must be given access to his or her education records.[6]

(2) The institution must provide an opportunity to the student for a hearing to challenge information in those records that is "inaccurate, misleading, or otherwise in violation of the privacy or other rights of students."[7]

(3) Subject to some exceptions, personally identifiable information in the records cannot be disclosed to third parties without the student's written consent.[8]

(4) The institution must keep a record of each third party who has requested or who has obtained access to the records.[9]

(5) Personal information may only be disclosed by the institution to third parties on the condition that they will not disclose it to anyone else without the student's written consent.[10]

(6) The institution must inform students of their rights under FERPA.[11]

(7) The U.S. Secretary of Health, Education, and Welfare is required to set up an office and review board to investigate, process, review, and adjudicate violations of FERPA.[12]

FERPA was enacted in response to a growing concern in this country with government collection and use of information on individuals. Numerous reports and articles have been written on this subject,[13] and courts increasingly are being asked to make judgments on the government's right to collect, keep, and use records and the rights of citizens respecting those records.[14] FERPA is the Congress' response to this concern in the specific context of school records.

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[6] 20 U.S.C.A. 1232g(a)(1).

[7] 20 U.S.C.A. 1232g(a)(2).

[8] 20 U.S.C.A. 1232g(b)(1), (b)(2).

[9] 20 U.S.C.A. 1232g(b)(4)(A). There are a few exceptions. See the discussion on record of disclosures in section V.A below.

[10] 20 U.S.C.A. 1232g(b)(4)(B).

[11] 20 U.S.C.A. 1232g(e).

[12] 20 U.S.C.A. 1232g(f), (g).

[13] e.g., *Project, Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971 (1975) (referred to hereafter as *GOVERNMENT INFORMATION*); RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, Report of the Secretary's Advisory Committee on Automated Personal Data Systems, DHEW Publication No. (OS) 73-97 (1973) (with bibliography at pages 298-330); RESOLVED: THAT MORE STRINGENT CONTROL SHOULD BE IMPOSED UPON GOVERNMENT AGENCIES GATHERING INFORMATION ABOUT UNITED STATES CITIZENS—A COLLECTION OF EXCERPTS AND BIBLIOGRAPHY RELATING TO THE INTERCOLLEGIATE DEBATE TOPIC, 1971-1972, compiled by the Congressional Research Service, Library of Congress, Document No. 92-167 (1971).

[14] Expungement of government records has been requested by plaintiffs in a variety of contexts, with somewhat mixed results. In a line of cases beginning with *Laird v. Tatum*, 408 U.S. 1 (1972), for example, a number of suits have been held not to be justiciable under the First Amendment because plaintiffs did not sufficiently allege a direct injury or threat of injury from the existence of government surveillance records. See *Donohoe v. Duling*, 465 F.2d 196 (4th Cir. 1972); *Finley v. Hampton*, 473 F.2d 180 (D.C. Cir. 1972); *Fifth Avenue Peace Parade Committee v. Gray*, 480 F.2d 326 (2d Cir. 1973). In other cases, the courts have found sufficient injury to decide the expungement issue on the merits. See *Handschu v. Special Services Division*, 349 F. Supp. 766 (1972); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973); *Paton v. LaPrade*, 524 F.2d 862 (3rd Cir. 1975). Other cases have considered whether a particular use of records by the government violates a right to privacy under the U.S. Constitution, e.g.: *Roe v. Ingraham*, 480 F.2d 102 (2d Cir. 1973); *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973); *Jaffess v. Secretary, Department of Health, Education, and Welfare*, 393 F. Supp. 626 (E.D.N.Y. 1975).

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The law was enacted on August 21, 1974, and took effect on November 19, 1974.[15] Added as an amendment to a major Federal education bill on the Senate floor,[16] it was never exposed to public hearings or to consideration by the Senate or House committees which are responsible for education legislation. After a storm of protest, primarily from the higher education community, a major set of amendments to FERPA was enacted on December 31, 1974. These amendments were added on the Senate floor to a Senate Joint Resolution authorizing a White House conference on library and information services.[17] Once again, public hearings and committee consideration were bypassed. Most people familiar with the legislation agree, however, that the amendments greatly improved the originally enacted law.

Since enactment, the U.S. Department of Health, Education, and Welfare (HEW) has been working to implement the law. Proposed regulations were published in the *Federal Register* on January 6, 1975, only six days after the amendments to FERPA had been enacted.[18] In the same document, HEW announced the establishment of an office to administer FERPA.[19] Three hundred and twenty-one public comments, two HEW Secretaries, and 17 months later, a full set of final regulations was published, effective on June 17, 1976.[20] Since that date, the regulations have been amended only once, to correct some technical errors.[21] The preamble to the final regulations, however, promised that additional public comments would be solicited by HEW during a ninety-day period beginning on July 1, 1977, and further changes may result.[22]

HEW has received thousands of inquiries about FERPA, including eight thousand during the nine months preceding publication of the final regulations.[23] However, as of November, 1976, only eighty of these were actually complaints about alleged violations of the Act.[24] While HEW has authority under the Act to terminate Office of Education funding for violations, no such action has been taken to date, and half of the complaints filed as of November, 1976 have been resolved.[25]

Perhaps the most surprising aspect of the implementation stage has been the relatively low number of complaints coming in to HEW. This would suggest that

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[15] Public Law 93-380, sections 513 and 2(c)(1)(1974).

[16] S. 1539, 93rd Cong., 2d Sess. (1974); 120 Cong. Rec. 14579 *et seq.* (1974).

[17] 120 Cong. Rec. 39858 *et seq.* (1974).

[18] 40 Fed. Reg. 1207-1216 (January 6, 1975).

[19] The address of the HEW office at the time of this writing is:

The Family Educational Rights and Privacy Act
Office (FERPA)
Department of Health, Education, and Welfare
Room 526E, Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

[20] On March 2, 1976, an interim set of final regulations was published which only covered challenges to the content of education records (20 U.S.C.A. 1232g(a)(2)) and disclosures in health or safety emergencies (20 U.S.C.A. 1232g(b)(1)(I)). 41 Fed. Reg. 9061-9064 (March 2, 1976). These interim regulations were superseded by the ones published in June. 41 Fed. Reg. 24662 (June 17, 1976).

[21] 42 Fed. Reg. 4460-4461 (January 25, 1977).

[22] Preamble to the final regulations, 41 Fed. Reg. 24661, 24662 (June 17, 1976).

[23] Testimony of Thomas S. McFee, Deputy Assistant Secretary for Management Planning and Technology, HEW, before the Privacy Protection Study Commission on November 12, 1976. Mr. McFee also testified that as of the date of the hearing, a total of some 14,000 inquiries had been received by his office.

[24] *Ibid.*

[25] *Ibid.*

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predictions about the dire effects of the Act on education have simply not materialized. As stated by the HEW official who is responsible for administering FERPA: "The system has not come to a screeching halt; parents and administrators are not at one another's throats; and HEW has neither inundated schools with superfluous requirements or, in turn, been inundated with paper."[26]

If things are going so well, why should you read this article? A few words of explanation are appropriate. As originally enacted, the law left many basic questions unanswered, and there were numerous problems of interpretation. While the December 31 amendments resolved a number of these, they also raised additional questions. The issues discussed below are those which were not clearly answered by Congress in the amendments. Some have been resolved in the HEW regulations; others have not.

The discussion is intended to give attorneys a sensitivity for handling a FERPA question when a client comes in with it. Can the question be answered from the statute and regulations? Should the client be advised to write for clarification to the FERPA office? An attorney who has some familiarity with the types of issues involved under FERPA will be in a better position to make these kinds of judgments.

Much has been written about privacy, including FERPA.[28] Some is helpful in thinking about these issues; some is not, and may even be misleading. For a practicing attorney, it is important to realize that a client may be acting in reliance on some secondary source material which, if something other than the regulations, may be leading the client astray. It is also important to realize that FERPA interacts with other privacy law to a greater or lesser extent. Privacy is protected to some degree by the U.S. Constitution, the Privacy Act of 1974,[29] the Freedom of Information Act,[30] other Federal laws protecting specific areas of privacy or types of information,[31] state statutes,[32] and the common law.[33] While these other sources of legal privacy are not discussed at any length in this article, some references are provided where there are relationships to particular issues under FERPA.

Before turning to the issues, two points are worth emphasizing. The purpose of FERPA is to protect privacy, an important interest.[34] The statute should be entitled to the description "remedial legislation" and to the rules of construction that courts will apply under that rubric. The rights of parents and students should be read

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[26] *Ibid.*

[27] See the discussion on letters and statements of recommendation in SECTION II.C below.

[28] Articles specifically on FERPA include: Note, *Federal Genesis of Comprehensive Protection of Student Educational Record Rights: the Family Educational Rights and Privacy Act of 1974*, 61 IOWA L. REV 74 (1975); and Note, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATH U. L. REV 588 (1975).

[29] 5 U.S.C.A. 552a.

[30] 5 U.S.C.A. 552.

[31] For example: Records relating to handicapped children must be safeguarded under Part B of the Education of the Handicapped Act (20 U.S.C.A. 1412(2)(D), 1417(c)); see the regulations which implement these sections published in the *Federal Register* on August 23, 1977, 42 Fed. Reg. 42473, 42498-42499 (to be codified at 45 C.F.R. §§ 121a.560-121a.576).

[32] Some of these are compiled in *Government Information, supra*, footnote 13.

[33] A good survey (as of 1975) of law relating to government records and individual privacy may be found in *Goverment Information, supra*, footnote 13.

[34] See generally *Roe v. Wade*, 410 U.S. 113, 115 (1973); *Merriken, supra*, footnote 14, at 918.

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broadly, and the exceptions to those rights should be read narrowly. The second point is that HEW, a Federal agency, has responsibility for administering and enforcing those rights. The HEW regulations will be given weight in a court,[35] and HEW interpretations of the law, while not controlling on a court, will be given some degree of deference.[36] Of course, if not challenged in court the HEW regulations will control until they are changed by the agency itself. This means that an attorney must be prepared to deal with the Federal bureaucracy, as well as with the statute and regulations.

II. Applicability and Scope of the Act

A. Coverage of Institutions of Postsecondary Education

Although, as stated in the introduction to this article, FERPA applies to most educational agencies and institutions in the United States, the Act itself does not directly require that any institution provide the privacy protections that are set out. Rather, it requires that "no funds shall be made available under any [program administered by the U.S. Commissioner of Education] to any educational agency or institution" which does not provide those protections.[37] If an institution does not have funds made available to it under one or more U.S. Office of Education programs, HEW has no means of enforcing the substantive requirements of FERPA. (Whether a private right of action would be available to a student is an issue beyond the scope of this article.)

Nevertheless, most institutions are covered. The Commissioner of Education is responsible for administering more than 100 Federal education assistance programs, and under many of these, funds are provided to institutions of postsecondary education in the form of direct grants or contracts. Besides these institutions directly receiving federal funds, another major class of institutions is also covered by FERPA under the HEW regulations. These are the institutions which do not receive funds directly from Office of Education programs, but whose students receive grants or loans under those programs. Millions of students in this country receive loans under the Guaranteed Student Loan Program.[38] Millions of students receive grants under the Basic Educational Opportunity Grant Program.[39] Both of these programs are administered by the Commissioner of Education. HEW takes the position in its regulations that funds from these loans and grants to students are "made available" to the institution which the students attend.[40] The impact of this rule is substantial, bringing an estimated 3000-4000 additional institutions under the requirements of FERPA.[41] To understand the reasoning behind this rule, it is necessary to consider

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[35] *National Nutritional Foods Association v. Weinberger*, 512 F. 2d 688 (3d Cir. 1975).

[36] Davis, *Administrative Law of the Seventies*, § 5.05 (1976).

[37] 20 U.S.C.A. 1232g(a)(1)(A), (a)(2), (b)(1), (b)(2), (e). The Act uses the term "applicable program" in place of the bracketed material. This is limited to programs administered by the U.S. Commissioner of Education by section 421 of the General Education Provisions Act. (20 U.S.C.A. 1230).

[38] Based on conversations between the author and various Office of Education officials.

[39] *Ibid.*

[40] 45 C.F.R. 99.1(c)(2).

[41] Based on conversations between the author and various Office of Education officials.

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the nature of these two programs and to make some comparisons with some of the civil rights laws.

Under the Basic Opportunity Grant Program, an undergraduate student who is enrolled in good standing at an accredited institution of higher education, on at least a half-time basis, is entitled by statute to receive a grant. The amount of the grant is based on need, the cost of education at the institution in which the student is enrolled, and (possibly) the amount appropriated for the program by Congress. The student must use the grant to pay for educational expenses, which may include tuition.[42]

There are two components in the Guaranteed Student Loan Program. Under the Federally Insured Student Loan Program, the Office of Education guarantees the lender against the student's default. The lender may be a financial institution or an educational institution. Under the other component, the guarantee agency is a state agency or a private non-profit agency. The Office of Education reimburses the guarantee agency for 80% of the amount of principal paid to lenders because of default claims. Under both components, the Office of Education also pays the holder of the student's promissory note a "special allowance" of up to three per cent of the principal during the life of the note. On behalf of a student who meets a needs test, the Office of Education also pays the holder the interest earned on the note during the student's enrollment and an additional nine-month "grace period". To qualify for a loan, the student must be enrolled on at least a half-time basis at an accredited institution. The student must use the loan to pay for educational expenses, which may include tuition.[43]

The HEW regulations provide that "funds will be considered to have been made available to an agency or institution when [the funds] . . . (2) are provided to students attending the agency or institution and the funds *may* be paid to the agency or institution by those students for educational purposes . . . ."[44] The regulation then states that examples of this rule are the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program.

This broad coverage is consistent with coverage under the civil rights laws that HEW administers, which apply to all institutions which receive "Federal financial assistance". In *Bob Jones University v. Johnson*,[45] a federal district court concluded that a university was a recipient of federal financial assistance within the meaning of Title VI of the Civil Rights Act of 1964, because grants were made to its students under the Veterans Educational Assistance Act.[46] These grants are provided under a statutory scheme which resembles the Basic Educational Opportunity Grants Program in substantial respects.[47] The district court reasoned, in part, that (1) the method of payment is irrelevant; (2) the benefits are specifically tied to participation in an educational program since they must be used to pursue an approved course of study at an approved institution; (3) the institution receives "assistance" since the funds are in fact paid to the university in the form of tuition, and the university is benefited by the fact that some veterans would not be able to attend without the aid of the grant funds; and (4) Title VI is remedial legislation and its coverage should be read broadly.[48] On appeal, the district court was affirmed by the Fourth Circuit U.S. Court of Appeals.[49]

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[42] 20 U.S.C.A. 1070a.

[43] 20 U.S.C.A. 1071 *et seq. See* Jenkins, *Regulation of Colleges and Universities Under the Guaranteed Student Loan Program*, 4 J. of Coll. and U. L. 13 (1977).

[44] 45 C.F.R. 99.1(c)(2) (italics added).

[45] 396 F. Supp. 597 (D.S.C. 1974).

[46] *Ibid.* at 601-604.

[47] 38 U.S.C.A. Ch. 34 (Supp. 1976).

The reasoning of the court in *Bob Jones* would seem to be applicable to the coverage issue under FERPA. Like Title VI, the applicability of FERPA is not conditioned on whether "payments" are made to an institution. Funds under the Basic Educational Opportunity Grant Program and the Guaranteed Student Loan Program are in fact used by students to pay tuition to the institutions they attend, although, like the veterans' grants, the funds are not "earmarked" for tuition. A university attended by students receiving the federal funds is "benefited" by the increase in the number of students who can afford the costs of higher education. Finally, while the rights protected under FERPA may not be as constitutionally significant as the right to nondiscrimination, the Act is certainly remedial in nature and entitled to a broad construction.

This is not to suggest that there are no arguments for a narrower coverage under FERPA. It could be argued that by choosing to subject an institution to FERPA only if funds were "made available" to it, Congress intended a different result than that under Title VI, where coverage hinges on whether the institution is a recipient of "Federal financial assistance". The next step might be to argue that the phrase "no funds shall be made available" must be read to mean: "no funds shall be made available directly by the Commissioner of Education to the institution . . . ." This would exclude funds under the Basic Educational Opportunity Grants Program, since they are given to the student, not directly to the institution. It would also exclude funds under the Guaranteed Student Loan Program (except where the institution is also the lender), since loan funds go to the student. Alternatively, funds under the Guaranteed Student Loan Program might be excluded (except where the institution is also the lender) if "funds" were interpreted to mean "federal funds". Since guaranteed student loans are made by private lenders, with the Federal Government merely guaranteeing the lender or guarantee agency against the student's default, no "federal funds" are made available to either the institution or the student.

While the language in FERPA is susceptible to a variety of readings, the position taken in the HEW regulations appears to be the best possible expression of Congressional intent, and the construction most likely to stand up in court.

B. Former Students

1. *Consent by former students to disclosure.* Subject to a specific list of exceptions, an institution covered by FERPA must give its students the right to prevent third-party access to information from their education records. The student must

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[48] 396 F. Supp. at 602-604.

[49] 529 F.2d 514 (4th Cir. 1975).

consent in writing to that access.[50] To what extent do these protections apply to the institution's *former* students?

The Act does not specifically state that former students must give their consent before the institution may release information from their records. Rather, the Act provides that Office of Education funds must be withheld from the institution if it has "a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information...) of *students* without [their] written consent...."[51] In contrast, the portions of the Act which give students their own right of access to their education records, and their right to a hearing to challenge the content of those records, specifically extend to "students who are or have been in attendance."[52]

While it may have been possible to restrict the consent requirement to students currently in attendance, the HEW regulations clearly extend it to both present and former students.[53] A number of arguments support this view of the Act's coverage. Although the issue was not recognized in the legislative history of the December 31 amendments to FERPA, a broad definition was added to the Act at that time. A "student" under FERPA "includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information but does not include a person who has not been in attendance at such agency or institution."[54] The definition was added for the specific purpose of excluding applicants for admission from coverage under FERPA. If Congress had also meant to exclude former students from the consent requirement, it could have done so specifically, if not in the definition of student, then in the consent requirement itself. (An exclusion in the definition of "student" would create an internal inconsistency in the Act, since access rights extend to "students... who have been in attendance".) The definition of "student" clearly is general enough to include former students, and excluding them would be a major restriction on the Act's coverage. Moreover, a possible explanation exists for the difference in language between the student access and hearing provisions, on the one hand, and the consent requirement on the other. In the Act as originally passed in August, access rights were given to "students attending" an educational institution, while under the hearing provision, there was no language delimiting the provision's applicability to present or former students. It would have been possible (although perhaps unlikely) to read the Act as requiring access for present students only, but hearing rights for both present and former students.[55] In the December 31 amendments Congress eliminated this inconsistency in language by making both rights applicable to "students who are or have been in attendance." On the other hand, the original version of the consent requirement referred to "students", without qualification of their attendance status. The December 31 amendments did not change this, and perhaps Congress believed no change was necessary, particularly with the addition of a broad definition of "student". There is no evidence one way or the other in the legislative history, however, and it may have simply been an oversight on Congress' part not to conform these provisions.

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[50] 45 C.F.R. 99.30.

[51] 20 U.S.C.A. 1232g(b)(1) (italics added).

[52] 20 U.S.C.A. 1232g(a)(1), (2).

[53] 45 C.F.R. 99.1(d).

[54] 20 U.S.C.A. 1232g(a)(6); 45 C.F.R. 99.3.

[55] The need for clarification on this point is recognized in the legislative history of the December 31 amendments. See 120 Cong. Rec. 39862 (1974).

Given the broad definition of "student", the drafting complexity of the December 31 amendments (FERPA was not reenacted; it was amended with a series of inserts and deletions that are undecipherable standing alone), and the remedial nature of the Act, the position taken in the HEW regulations is almost certainly correct. Both present and former students must be given the right to consent to the release of information from their education records.

2. *Records created after the student no longer attends the institution.* Under the HEW regulations, records created after a student leaves the institution are not subject to FERPA. This is accomplished by excluding from the definition of "education records": "records of an education agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution."[56] This exclusion at first seems to create an anomaly in the regulations. The term education records is defined, subject to a list of four specific exceptions. The regulations add a fifth exception, records relating to former students, presumably under the authority of the statutory definition. The definition, however, is very broad on its face, including "records which: (1) are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency of institution."[57] As noted above, the regulations treat the statutory term "student", for purposes of requiring prior written consent to disclosures, as including former students. But for purposes of the definition of "education records", the regulations seem to provide in effect that the statutory term "student" does not include former students.

This exclusion was added in the final regulations. The proposed rules only listed the four statutory exceptions to the term "education records", and defined the term student to mean "any person who is attending or has attended an educational institution and [with respect to whom] that [institution maintains education records or personally identifiable information.]"[58] An HEW comment in the text of the proposed rules stated that the definition was intended to "make it clear that former students are included in the term 'student' as used in [FERPA]."[59] In the preamble to the final regulations, a comment from the public is set forth which asked whether former students are covered under FERPA. The HEW response to this comment merely states that "student" has been redefined to conform to the definition in the Act. No explanation is given for the exclusion of former students' records from education records.

While HEW could have written a regulation that covered records created on former students, its position on this issue has some merit. What HEW has done is to provide that records "directly related to a student"[60] does not include records

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[56] 45 C.F.R. 99.3.

[57] 45 C.F.R. 99.3, based on 20 U.S.C.A. 1232g (a)(4)(A) (definition of "education records").

[58] Proposed section 99.3. 40 Fed. Reg. 1211 (January 6, 1975) (brackets indicate repetition of statutory language).

[59] *Ibid.*

[60] 45 C.F.R. 99.3; 20 U.S.C.A. 1232g(a)(4)(A) (definition of "education records").

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created after the time the person was a student at that institution. Presumably, these records would be less likely to contain information of the kind that concerned the Congress, although the legislative history is not clear on this point.[61] The HEW regulation will certainly make it easier for institutions to keep contact with their alumni, publish newsletters about alumni activities, and solicit funds. For example, removal of the consent requirement means that information on former students may more easily be disclosed to an alumni, fund-raising, or other organization that is not part of the institution itself. Finally, it should be noted that the HEW regulation on this point does not give former students any fewer rights than present students. It is an entire class of records that is excluded from coverage, and the exclusion applies to everyone equally.

3. *Notice to former students of their rights.* There are two instances where former students are not given the same rights as students who are presently in attendance. FERPA provides that no Office of Education funds may be made available to an institution of postsecondary education unless it informs students who are "attending" the institution, of their rights.[62] The HEW regulations implement this provision by stating that the institution must notify students who are "in attendance",[63] thus "making it clear that the notification of rights . . . need not be provided to former students . . . ."[64]

Former students are also treated differently from students in attendance in the type of procedure required for release of directory information. An institution may disclose directory information without obtaining consent if it gives public notice of the categories of information it has designated as directory information, and gives students an opportunity to object. If a student objects to one or more categories, the institution cannot designate those categories as directory information with respect to that student.[65] Directory information on former students may be disclosed, however, without following these procedures.[66] This result is consistent with HEW's rule on notification of rights. The Act requires "public notice of the categories of information which [the institution] has designated as [directory] information with respect to each student *attending* the institution . . . ."[67] Here, as with the notification of rights, the statutory prescription applies only with respect to students "attending" the institution. In both cases, HEW has taken the position in its regulations that former students should not be included.

C. *Admissions Records and Letters of Recommendation*

In the December 31 amendments to FERPA, Congress responded to one of the major areas of concern of the higher education community—admissions records and letters of recommendation. The result was a complex set of rules for HEW to deal with in its regulations. Congress addressed several issues in this area: records of applicants who are not admitted to the institution, letters of recommendation written before and after January 1, 1975, and waiver by a student of his or her right to inspect letters of recommendation. The HEW regulations resolve two related issues: whether the student or the parent waives the student's rights regarding letters of recommendation if the student is under 18, and the rights of a student already in attendance who applies for admission to a different component of the institution.

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[61] 120 Cong. Rec. 39862 (1974).

[62] 20 U.S.C.A. 1232g(e).

[63] 45 C.F.R. 99.6(a).

[64] 41 Fed. Reg. 24664, June 17, 1976.

[65] The type of information which may be included is discussed in section II.D below.

[66] 45 C.F.R. 99.37 (c).

[67] 20 U.S.C.A. 1232g(a)(5)(B) (italics added).

Applicants for admission to an institution of postsecondary education have no rights under FERPA until they are admitted and in attendance at the institution. FERPA defines "student" to exclude anyone who has not been in attendance.[68] The HEW regulations expand on this exclusion and state that a person applying for admission to a component unit of an institution is not a "student" at that component, even if he or she is attending another component unit at the same institution.[69] Thus, an undergraduate student at a university who applies unsuccessfully to the university medical school does not have any rights under FERPA respecting admissions records at the medical school.

This treatment of a university as severable components contrasts with HEW's definition of "educational agency or institution": "... The term refers to the agency or institution as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution."[70] The explanation for this difference lies in the scope of FERPA and of HEW's enforcement mechanism. As noted above, FERPA applies to each educational agency or institution to which Office of Education funds are made available. These funds are made available to the institution, not to its components, since the institution is the entity legally entitled to receive the funds. It is the institution that must comply with the Act, and the components are part of the institution. Each component is therefore subject to FERPA, even if it does not participate directly in the use of the funds. A violation by a medical school, for example, could lead to termination of funds to the entire university.[71] The encompassing definition of "educational agency or institution" prevents the university from defending the violation by claiming that its medical school does not receive Office of Education funds and is therefore not subject to the Act.

The HEW regulations differentiate coverage of the institution from coverage of a certain class of student records. While each of the institution's components is covered under FERPA if the Office of Education had made funds available to the institution, admissions records of a component are not covered if the student does not attend that component. This rule avoids a difference in treatment between student applicants already in attendance at the institution and students who are applying from outside the institution.

Tied closely to the general question of admissions records is the treatment of letters of recommendation. Congress provided two forms of relief to institutions in this area, and HEW has provided some clarifying rules with respect to them. The institution need not allow a student to see confidential letters of recommendation which were put in the student's file before January 1, 1975, if the understanding of confidentiality can be documented and the letters are only used for the purposes for which they were specifically intended.[72] In addition, the student can waive his or her right to see confidential letters of recommendation placed in the file on or after January 1, 1975 respecting admission, employment, or receipt of an honor or honorary recognition.[73] There are several conditions to a valid waiver. The student retains the right to request the names of all persons providing the letters. As with letters placed in the file before January 1, 1975, the letters may only be used for the purposes for which they were intended.[74] The waiver cannot be required by the institution was a condition of admission or of any service or benefit.[75] The waiver must be executed by the student, even if he or she is under 18.[76]

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[68] 20 U.S.C.A. 1232g(a)(6); 45 C.F.R. 99.3 (definition of "student").

[69] 45 C.F.R. 99.3 (definition of "student").

[70] *Ibid.* (definition of "educational agency or institution").

[71] 45 C.F.R. 99.64.

D. Directory Information—Disclosure Without Consent

As noted in II.B.3 above, an institution may establish certain categories of "directory information" if it follows the procedures in the HEW regulations. It may then disclose this information without the student's consent. The categories of information which may be included are:

> the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, *and other similar information*[77]

This definition from the regulations follows the statutory definition closely, except that the italicized phrase has been added. In the preamble to its final regulations, HEW stated in response to a public comment that "[t]he definition of directory information has been modified to conform with the statutory definition: that is, that it 'includes' the enumerated information.[78] For guidance as to what further information could be included, the phrase '. . . and other similar information' has been added to the definition."[79]

While other questions might be asked regarding the definition of directory information, the most perplexing for an institution may be trying to decide whether a certain piece of information is "similar" to those listed. Is a student's class schedule similar to her or her major field of study? Is a student identification number similar to the student's name? If the student has established residency in the city where the institution is located, is the parents' address similar to the student's address? The list of possible questions is virtually endless, and there are no certain answers. However, there may be some reasonable guides that an institution can use.

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[72] 20 U.S.C.A. 1232g(a)(1)(B)(ii); 45 C.F.R. 99.12 (a)(2).

[73] 20 U.S.C.A. 1232g(a)(1)(B)(iii); 45 C.F.R. 99.12 (a)(3).

[74] The regulations have slightly different language on this point for the two classes of letters. There is, however, no apparent attempt to state different rules.

[75] 20 U.S.C.A. 1232g(a)(1)(C); 45 C.F.R. 99.7(c).

[76] 20 U.S.C.A. 1232g(a)(1)(B)(iii); 45 C.F.R 99.7(d).

[77] 45 C.F.R. 99.3 (definition of "directory information") (italics added).

[78] In the proposed rule, the definition stated that directory information "means" the various categories listed. The phrase "other similar information" was not included. Proposed section 99.3, 40 Fed. Reg. 1210 (January 6, 1975).

[79] 41 Fed. Reg. 24662 (June 17, 1976).

In enacting this provision, Congress apparently intended to invoke a "rule of reason" with respect to the consent requirement. While there are exceptions, such as unlisted telephone numbers, the categories of information listed in the definition are generally available from sources other than the student's education records. The exceptions are protected by the student's right to keep the information from being established as directory information. Therefore, if a certain category is at least arguably similar to one of the categories listed, and is available from other sources, there should be no problem in establishing it as directory information.

Another pertinent question is how innocuous is the category of information? If there are situations where students might feel that their pirvacy would be invaded by its disclosure, and it does not fit easily within one of the specific categories, the institution should not try to establish it as directory information.

Even if a category is arguably within the definition, the institution might consider deleting it anyway, if a number of students are likely to object. The complexities of keeping track of which students have objected and which have not, with respect to a particular category, could remove the advantage of establishing it as directory information.

As a final note on this subject, there is no evidence, other than the term itself, that "directory information" must be information found in a directory. The categories of information that can be included must be deduced from the definition. The institution must decide in each case whether a category fits within those listed, or is "similar" to one of them.

E. Private Records—Exclusion from Education Records

Under FERPA, students in postsecondary education are only given access and other rights respecting their "education records". This term is defined in the Act to include:

> those records, files, documents, and other materials which—
> (i) contain information directly related to a student; and
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.[80]

This definition is probably broad enough to include all or nearly all personally identifiable information that an institution maintains on its students. Congress provided four specific exceptions to the definition of "education records", however, thereby removing certain records from coverage under FERPA. The first of these exceptions is for records which are kept in the sole possession of the person who made them, and are not accessible or revealed to anyone else, other than a substitute.[81] (The regulations provide that a "substitute" is someone who takes over the person's duties on a temporary basis.[82])

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[80] 20 U.S.C.A. 1232g(a)(4)(A); 45 C.F.R. 99.3 (definition of "education records").

[81] 20 U.S.C.A. 1232g(a)(4)(B)(i).

An important aspect of this exception is the absence of any limitation on the use which may be made of the information by the maker of the record. Apparently, as long as the information is not accessible or revealed to anyone else, it may be used as the basis for grades, for recommendations, or for other purposes which are within the discretion of that person. This runs counter to the general purpose of FERPA, which is to give students access to any information which is used in making decisions about them.[83] The exception may be a recognition by Congress that a broader coverage would make compliance with a request for access to all of a student's records extremely difficult. It is noteworthy that the exception is consistent with another Federal law on recordkeeping practices.[84]

A minor dilemma results when the person who made the record wishes to share it. Until information in the record is disclosed, it is not part of the student's "education records". If it is disclosed, the exception no longer applies, and the student must be given all of the FERPA rights. One of these is the right to withhold consent to disclosure of the information. If the record does not become an "education record" until after it is disclosed, the student would not be afforded the right to withhold consent to the intitial disclosure. Given the broad purpose of the Act, however, this is not a likely result. A disclosure of information from a private record is probably subject to the requirement of prior consent, since the disclosure itself would bring the information under the coverage of the Act.

The same reasoning applies to the question of when the record is created. A professor writes a recommendation for a student and sends it to the institution which needed it. The professor then places a copy of the recommendation in his private file. Should the professor have obtained the student's written consent before he sent the recommendation? Does the student have a right of access to the copy of the letter in the professor's file (assuming the student had not already consented or waived his right of access)? The answer to both of these questions appears to be "yes". The consent requirement is intended to give the student control over third party access to personally identifiable information. If a record under any of the exceptions is not an "education record" until after the first disclosure, this control could be seriously impaired.

The exception for private records permits an institution to be primarily concerned about its own official records. When a student requests access, it will not be necessary to search through the private files of every institutional employee who has had contact with the student. On the other hand, the institution probably has a duty to inform its employees that those files can be kept private only if they are not shared with anyone except a substitute. Also, there should be some means of segregating any information which is disclosed from private files, so that the student can be given access to it on request. The HEW regulations require each institution to develop a detailed statement of policies and procedures to implement FERPA. Among other things, this statement must include a list of the types and locations of the institution's education records.[85] This would be the appropriate vehicle for the institution to communicate its practices with respect to information kept in private files by its employees.

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[82] 45 C.F.R. 99.3 (definition of "education records").

[83] 120 Cong. Rec. 39858-39859, 39862 (1974).

[84] The Privacy Act of 1974 has been interpreted not to cover "[u]ncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion ...." PRIVACY ACT GUIDELINES—July 1, 1975, Office of Management and Budget, 40 Fed. Reg. 28949, 28952 (July 9, 1975).

F. *Law Enforcement Records—Exclusion from Education Records*

A second exclusion from "education records" is provided for the records of a law enforcement unit of the institution.[86] This exclusion, added in the December 31 amendments, includes one of the knottiest unresolved issues in the Act. The regulations provide that "education records" do not include:

> Records of a law enforcement unit of an educational agency or institution which are:
> (i) Maintained apart from [the student's education records];
> (ii) Maintained solely for law enforcement purposes, and
> (iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided,* that education records maintained by the education agency or institution are not disclosed to the personnel of the law enforcement unit.[87]

Most institutions of postsecondary education would have a strong desire to prevent a student from seeing records in the hands of its campus police, particularly investigative records which are being prepared for law enforcement purposes. Under FERPA, this can only be accomplished if the conditions of the exclusions are met. The campus police may not have access to the student's education records. The records of the campus police may only be maintained for law enforcement purposes, and must be kept separate from the student's education records. The campus police records may only be disclosed to other "law enforcement officials of the same jurisdiction."

The most perplexing question under this provision is that is meant by the phrase "law enforcement officials of the same jurisdiction." The issue is significant because an institution's campus police unit is permitted to release information to these officials without having the information subjected to the student's rights of access and challenge provided under FERPA. As with information from private files of institutional employees, release to an unauthorized party would take away the exclusion, making the information an "education record." Such a release would be subject to the consent requirements of the Act, as discussed in II.E above.

The term "jurisdiction" can have a variety of meanings, depending on the context in which it is used.[88] It usually signifies the authority of a court or other tribunal to hear and decide a case,[89] but it sometimes means authority over a particular subject matter, and may mean the geographical area within which that authority may be exercised.[89a] Thus, there appear to be at least three different possible interpretations of "jurisdiction" as used in FERPA. First, its scope could be tied to the courts or tribunals which decide the cases which are within the authority of the campus police. For example, a campus police unit might only be responsible for investigating violations of the institution's own regulations, with adjudication of those violations solely an internal matter for the institution. In that case, the only law enforcement officials "of the same jurisdiction" would be those who were involved in enforcing the institution's regulations in that forum. On the other hand, the campus police might have authority to investigate violation of local or state criminal laws. Under this interpretation of "jurisdiction", the term would apply to the local or state courts, and law enforcement officials "of the same jurisdiction" would be the officials who have a role in enforcing laws over which those courts have authority.

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[85] 45 C.F.R. 99.5(a)(2)(iv).

[86] 20 U.S.C.A. 1232g(a)(4)(B)(ii).

[87] 45 C.F.R. 99.3 (definition of "education records").

[88] 50 C.J.S. *Jurisdiction,* at 1089-1090 (1947).

[89] *Ibid.,* at 1090; *The Fair v. Kohler Die Co.,* 228 U.S. 22, 25 (1913).

Alternatively, the term "jurisdiction" could be defined in terms of subject matter, without regard to the forum in which a case is adjudicated. If the campus police unit is authorized to investigate drug abuse violations, for example, its records could be shared with any other officials who enforce drug abuse laws. It would not matter whether the violation might be later adjudicated by federal, state, or local courts, the institution itself, or a combination of these. In releasing a record to a law enforcement official, the institution would only have to decide whether the official had subject matter authority which overlapped that of its campus police.

The third possibility would be to restrict the term "jurisdiction" by geography. The authority of a law enforcement unit is defined by the physical territory within which it may operate, as well as the particular laws it may enforce. If "jurisdiction" is interpreted to mean the physical boundaries of law enforcement authority, the campus police unit might only be allowed to release records to law enforcement officials of the town, city, or county in which the institution is located, although a broader reading would also permit release to any law enforcement officials of the state. Under this interpretation, neither overlapping subject matter authority or the adjudicative forum would be important.

It is not clear from the statute or its legislative history which of these interpretations, or possible variations on them, an institution should follow. Little direct guidance is provided by court decisions in other contexts. For example, under a federal statute it is a crime to make false statements "... in any matter within the jurisdiction of any department or agency of the United States .... "[90] The courts are in disagreement whether initiation of a criminal investigation is within the "jurisdiction" of the Federal Bureau of Investigation under this statute.[91] A common thread in these cases, however, is that the term must be interpreted in whatever manner best achieves the intent of Congress. The federal criminal statute prohibiting false statements has by and large been interpreted broadly, to carry out Congress' intent of protecting federal agency functions from being undermined because of inaccurate information.[92] In contrast. FERPA is intended to provide students with rights respecting their records. This argues for a narrow reading of any exceptions to these rights, including exceptions to the broadly defined term "education records."

[89a] 50 C.J.S. *Jurisdiction*, at 1091 (1947).

[90] 18 U.S.C.A. 1001.

[91] Cf. *Friedman v. U.S.*, 374 F. 2d 363 (8th Cir. 1967), with *United States v. Adler*, 380 F. 2d 917 (2d Cir. 1967). The Supreme Court declined to resolve the controversy between the Circuits in *Bryson v. United States*, 396 U.S. 64, 70-71nn. 9&10 (1969), although it seems to be leaning toward the broader interpretation.

Resolution of these concerns requires a balancing of the interests involved. While Congress intended to protect the rights of students, it also expressed an intention to allow the institution to continue to conduct its law enforcement activities in confidence. Of course, a balance can be drawn in any number of ways. If the student's rights under FERPA are to be maximized, perhaps institutional law enforcement units should only be allowed to release records if necessary to carry out their own law enforcement functions. This would be the narrowest possible reading of the exception under the "subject matter" analysis suggested above. Even if the balance is to be drawn more on the law enforcement side of the ledger, the "subject matter" approach might be the best, since it bears a more direct relationship to the functions of a campus police unit than do the court jurisdiction or geographical approaches. Under a broader treatment of "subject matter" jurisdiction, the campus police unit could release its records to officials who are responsible for enforcing the same or similar laws, or who have authority over the same kind of violations as that unit. This approach is broader because release could be made even if it was not necessary to the proper functioning of the campus unit. An example would be release of information gathered in an investigation of drug abuse to the Drug Enforcement Administration of the U.S. Department of Justice.

Until HEW or the courts provide a clear answer, the scope of the "law enforcement records" exception will continue to be a perplexing problem, and each institution will have to perform its own balancing act between student rights and effective law enforcement.

G. Employment Records—Exclusion From Education Records

Certain employment records are exclused from coverage under FERPA. The Act provides that the term "education records" does not include:

> in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose . . ."[93]

At first glance, this exlusion seems superfluous. FERPA only gives rights to persons who are or have been in attendance at the institution.[94] A person who has never been in attendance would therefore not have rights respecting any records maintained by the institution. Why, then, did Congress specifically exclude employment records of these persons from coverage under the Act? The legislative history provides no help in resolving the question.[95]

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[92] *Bryson, supra*, at 70.

[93] 20 U.S.C.A. 1232g(a)(4)(B)(iii).

[94] 20 U.S.C.A. 1232g(a)(6), (d); 45 C.F.R. 99.1(d), 99.3 (definitions of "eligible student" and "student").

One commentator, writing before the issuance of the final HEW regulations, suggested that the exclusion actually broadens the definition of "education records." The reason given for this conclusion was that the exclusion of certain employment records of persons not in attendance implies that their other employment records must be included.[96] While the logic of this reasoning may be sound, it would impute a Machiavellian approach to Congressional drafting that does not seem warranted. FERPA could have easily been written to apply to records of employees, as well as students, if that were Congress' intent.

A second possibility would be to read the exclusion as applying to employment records of students who are employed by the institution after their period of attendance. This would be consistent with the language of the exclusion ("persons . . . not in attendance") and would leave employment records of present students covered under FERPA. This interpretation, however, would make sense only if former students had rights under FERPA respecting all records the institution maintained on them, regardless of when those records were created. As discussed above, the HEW regulations accord former students no rights respecting records created on them after their period of attendance.

Consistent with its general position on records of former students, HEW has taken a third approach to the employment records exclusion. Under the definition of "education records" in its regulations, all employment records are excluded (subject to the three statutory conditions) except "records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student."[97] This regulation reflects a broad reading of the exclusion. Not only must the student be "in attendance" to see employment records, but the employment must result from his or her status as a student. This would prevent members of the institution's staff from enrolling in one or two courses and thereby obtaining rights under FERPA. (Whether this is sound policy may be a matter of one's point of view.) However, it also allows an institution to deny rights to existing students if their employment does not result from the fact that they are students. The scope of HEW's rule is difficult to determine. How closely must the employment relate to student status? If the institution gives a preference to students in hiring for certain jobs, would their employment records be subject to FERPA? Must the employment be part of the person's academic program, such as a work-study or cooperative education program? The HEW regulations do not answer these questions.

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[95] The legislative history is more confusing than the language in the statute itself. The only reference to the exclusion states: "The employment records of a person not attending a given school would not be available to him, even though he has been a student at another school, if they are used for other than employment purposes." (120 Cong. Rec. 39862 (1974)). The last phrase in the sentence is clearly incorrect as stated. If anything, the opposite is true.

[96] Note, *Federal Genesis of Comprehensive Protection of Student Educational Records Rights: The Family Educational Rights and Privacy Act of 1974*, 61 Iowa L. Rev. 74, 90 (1975).

[97] 45 C.F.R. 99.3 (definition of "education records").

III. Student Access to Records—The Right to Obtain a Copy

FERPA gives students at institutions of postsecondary education the right to "inspect and review" their education records.[97a] A student's request to exercise this right must be honored within a reasonable period of time, and in any case no more than 45 days after the request has been made.[97b] The HEW regulations provide that the institution must respond to reasonable requests by the student for explanations or interpretations of the records.[98]

A question that remains is the student's right to obtain a copy of those records. The Act is not clear on this point. A right to "inspect and review" does not by itself necessarily require that the student also be given a copy of the records, or even that the student be allowed to make a copy.

There are two instances under FERPA where such a right is specifically granted. First, the institution is permitted to disclose education records, without the student's consent, to other schools or school systems in which the student seeks or intends to enroll, subject to several conditions; one of these conditions is that the student "receive a copy of the record if desired."[99] Second, whenever the institution must and does obtain a student's consent to disclose an education record, it must provide a copy of the record being disclosed if the student requests it.[100] It is at least arguable that the student has no right to a copy outside of the two situations specifically provided for in the statute. Congress could have written a general right to a copy into the Act. Instead, it chose to limit a potentially onerous burden to two particular instances. The persuasiveness of this argument is tempered by two factors. First, the basic thrust of FERPA is to give students greater rights respecting their education records, not to limit those rights. Any implied limitations must be regarded with at least an initial skepticism. Second, the Act denies Office of Education funds to any institution "which has a policy of denying, *or which effectively prevents*" the student from inspecting and reviewing his or her education records.[101] It is possible that denial of a copy would "effectively prevent" some students from exercising their rights. This is discussed further below.

The HEW proposed rules would have given student an absolute right to copies of their education records, although the institution would have been permitted to charge them for the actual cost of reproduction.[102] Under the proposed rules, copying was considered part of the student's right of access, along with the right to explanations and interpretations of the records and other proposed rights.[103]

[97a] 20 U.S.C.A. 1232g(a)(1)(D), (d).

[97b] *Ibid.*

[98] 45 C.F.R. 99.11(b)(1).

[99] 20 U.S.C.A. 1232g(b)(1)(B).

[100] 20 U.S.C.A. 1232g(b)(2)(A), (d); 45 C.F.R. 99.30 (d).

[101] 20 U.S.C.A. 1232g(a)(1)(A) (italics added).

[102] Proposed section 99.13(c), 40 Fed. Reg. 1212 (January 6, 1975).

[103] An HEW comment following the text of proposed section 99.13 stated: "Paragraph (c) is necessary because a right to obtain copies is an essential part of a right of access. It should be noted that a counterargument may be made against including a right to copy: such a right might subject parents or students to undesirable pressure from third parties to turn over their entire records (for third parties to make admission, employment, credit rating, or other decisions) and that such a right should not be included in a right of access." 40 Fed. Reg. 1212 (January 6, 1975). Thus, even in its proposed rules, HEW was concerned with the effect of such an absolute right, and cast some doubt on its validity.

The final regulations, however, apparently stop short of providing a blanket right to obtain copies. Instead, they provide that the student's right to inspect and review education records includes:

> The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.[104]

By adopting this language, HEW has elected to fall back on the statute, rather than provide (or expressly deny) a general right to obtain copies.[105] Still, the regulations do suggest that there will be some situations not specifically covered in the Act where a student can insist on a copy of his or her record.

Denial of a copy would restrict a right to "inspect" records only if the student is unable to be physically present where the records exist, or if the information in the records is in a form, like a computer tape, that makes inspection impossible without a copy. Certainly in these cases the institution would be obliged to make a copy. It is also possible that failure to provide a copy could restrict the student's right to "review" the record, particularly if the institution (for some reason) could not provide the student with adequate time for that review. If the records were only available for review for a short time because of conflicts with the student's class schedule, for example, the only alternative for the institution would be to provide a copy.

Presumably, the cost of making copies could be charged to the student, subject to the rule that the institution must not effectively prevent the student's access. While the proposed rules would have specifically authorized charging the student, the final rules are simply silent on the subject.

IV. Challenges to Information in Education Records

A. *Information Subject to Challenge*

While access to education records is an important right given to students in postsecondary education, that right would have little practical effect without an opportunity to challenge inappropriate information contained in those records. An effective right to challenge is central to achieving the purposes of FERPA.

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[104] 45 C.F.R. 99.11(b)(2). The preamble to the final regulations does not discuss the change in language, and in fact states in one place that proposed section 99.13(c) was "incorporated" into section 99.11(b). 41 Fed. Reg. 24665 (June 17, 1976). In another place, the preamble states that proposed sections 99.13(c)&(d) were "redesignated" as sections 99.11(b)(1) & (b)(2). 41 Fed. Reg. 24666 (June 17, 1976). These words seem to imply that no change was intended. However, the right to obtain copies under the proposed rule clearly applied across the board, and the right under the final rule is just as clearly more limited.

[105] The final regulations are even more esoteric on the copies issue. Under the section which requires the institution to adopt a statement of policies and procedures under FERPA, the institution must:

> formulate and adopt a policy of—
>
> (2) Permitting . . . students to inspect and review the education records of the student in accordance with §99.11, including at least:
>
> • • • •
>
> (ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the institution feels it has a legitimate cause to deny a request for a copy of such records; . . .

45 C.F.R. 99.5(a)(2)(ii). This suggests that HEW at least disfavors denial of copies, and perhaps that the institution must have a "legitimate" reason for doing so in each case.

The Act requires each institution of post-secondary education which receives Office of Education funds to provide a hearing for any student

> to challenge the content of such student's records, in order to insure that the records are not *inaccurate, misleading, or otherwise in violation of the privacy or other rights of students,* and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein . . . .[106]

The student may challenge any information in his or her education records, but only on the grounds provided in the Act. The student must show that the information is "inaccurate, misleading, or otherwise in violation of the privacy or other rights of students." Thus, students cannot challenge grades given for performance in their courses, but only the accuracy of recording of the grades.[107]

Apart from a showing that information is inaccurate, the student's grounds for challenge are of uncertain scope. How would the student show that otherwise accurate information is nevertheless "misleading"? What are the privacy rights of students? What are the "other rights of students" referred to in the Act? How would a student show that his or her privacy or other rights have been violated?

Whether information is misleading can only be resolved in a particular context. Further, information which may mislead one person may not mislead another. In each case where a challenge is brought on this ground, all of the surrounding circumstances would have to be explored. Some pertinent questions may be: How might the information, taken alone, mislead someone who does not know the student? Is the information in a context that removes its potential for misleading someone? If the information is released, would that contextual information automatically be released with it? (The context may cure the defect in some cases.) Is it possible that the information will be used to make decisions about the student, now or in the future? (Information may be misleading to a greater or lesser degree, but if it may be used for decision-making, it would be particularly important to remove any ambiguities.)

The Act does not govern the types of education records that an institution may maintain. Neither does it specify what substantive rights students may have with respect to the types of information maintained. FERPA is essentially a procedural statute and only creates procedural rights—access, challenge, disclosure, and so forth. The "privacy and other rights of students" must therefore derive from other laws.

In fact, students do have rights apart from FERPA respecting their education records. For example, in *Goss v. Lopez,*[108] students who were suspended from school without adequate due process were given the right to have their records expunged of the fact of suspension. This is a right of students in public institutions, since only public institutions are subject to the due process requirements of the Fourteenth Amendment. While it is not within the scope of this article to explore other possible student rights respecting education records outside of FERPA, no doubt ingenious students and attorneys will find such rights in different contexts, either under the U.S. Constitution, other Federal or State law, or the common law.

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[106] 20 U.S.C.A. 1232g(a)(2) (italics added).

[107] 120 Cong. Rec. 39862 (1974).

[108] 419 U.S. 565, 567, 572 (1975), affirming an order by a three-judge court which granted an injunction to expunge the student's records.

B. Placing an Explanation in the Record if the Challenge Fails

The institution must provide the student with an opportunity to challenge the information in education records. In addition, the institution must give the student an opportunity to correct or delete any inappropriate information in those records "and to insert into such records a written explanation . . . respecting the content of such records."[109]

The HEW proposed regulations essentially repeated this language from the Act without elaboration.[110] They did not specify when the institution must allow the student to place a written explanation in the records. This question was answered in the final regulations. If the institution decides that the information is inappropriate, it must amend the records accordingly and inform the student in writing that it has done so.[111] On the other hand, if the institution decides that the information is not inappropriate under the FERPA standards, it must

> inform . . . the student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the . . . institution.[112]

Although the regulations could be more explicit, the intent is almost certainly to allow placement of an explanation in the records only where the institution finds the student's challenge to be without merit. If the record is amended as requested by the student, the institution does not also have to allow insertion of the explanation.

The Act provides for an opportunity to correct "and" insert an explanation.[113] Based on this language, HEW could have chosen to require both remedies in every case. However, its decision not to do so is based on sound policy grounds. If the record has been corrected, the danger of misuse of the offending information has been removed, and there is no longer any reason for insertion of an explanation.

The HEW regulations provide additional protection to the student who places an explanation in the record. The explanation must be maintained by the institution as long as it maintains the contested portion of the education records,[114] and the explanation must be given to anyone to whom the education record is disclosed. Thus, a third party who sees the information objected to by the student also sees the student's explanation.

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[109] 20 U.S.C.A. 1232g(a)(2).

[110] Proposed section 99.20, 40 Fed. Reg. 1213 (January 6, 1975).

[111] 45 C.F.R. 99.21(b).

[112] 45 C.F.R. 99.21(c).

[113] The legislative history of FERPA is unclear on this point. "The (right to challenge) is intended . . . to give (students) the opportunity to challenge and to correct—or at least enter an explanatory statement—inaccurate, misleading or inappropriate information about them . . . ." 120 Cong. Rec. 39862 (1974).

[114] 45 C.F.R. 99.21(d).

V. Disclosure of Education Records

A. Disclosure to the Student

Before turning to more esoteric issues relating to disclosure of education records, it is worthwhile to briefly discuss disclosure to the student. Here, for a change, the answers to the basic questions are fairly clear in the Act and regulations.

Subject to a list of exceptions, an institution of postsecondary education which receives funds under Office of Education programs may not disclose personally identifiable information from a student's education records without the student's written consent.[114a] The regulations make it clear that this stricture does not apply to disclosures to the student.[115] Although the Act does not list the student as one of the exceptions to the consent requirement, HEW's position is necessary to avoid making a mockery out of the requirement and interfering with the student's right of right of access.

On another point, one of the areas of confusion with FERPA as originally enacted was the parent's right to see the student's records. Can the parent of a college student be sent that student's grades? The original law, not changed by December 31 amendments, provided that:

> whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter *only* be required of and accorded to the student.[116]

Congress recognized that a question existed regarding parental access,[117] and resolved it in the December 31 amendments. A parent may be given information from a student's education records only if the student is a "dependent" as defined in section 152 of the Internal Revenue Code of 1954.[118] Congress evidently believed that an independent student should be recognized as such, and given the right to deny parents' access to his or her education records. On the other hand, if the student depends on parental support to finish college, the parents should be allowed to be informed without the student exercising a veto. All in all, the interests involved seem to be nicely balanced.

Finally, it should be noted that FERPA does not require an institution of postsecondary education to disclose education records to anyone but the student. The list of exceptions to the consent requirement are all permissive disclosures, as far as FERPA is concerned. The extent to which other laws may require the institution to make use of the exceptions is not within the scope of this article.

[114a] 20 U.S.C.A. 1232g(b)(1), (b)(2).

[115] 45 C.F.R. 99.30(a)(2).

[116] 20 U.S.C.A. 1232g(d) (italics added).

[117] 120 Cong. Rec. 39863 (1974).

[118] 20 U.S.C.A. 1232g(b)(1)(H).

B. Disclosure to School Officials with Legitimate Educational Interests

In addition to obtaining the student's consent, there are eleven situations under FERPA where an institution may release personally identifiable information from education records, to a party other than the student, without risking the loss of its Office of Education funds. The disclosure of directory information is one of these, and as discussed in II.D above, the student may exercise a veto power when the categories of directory information are published by the institution. This leaves ten true exceptions to the consent requirement.[119]

The first of these ten exceptions set forth in the Act, and certainly one of the most important, is for disclosures to:

> other school officials, including teachers within the educational institution . . . who have been determined by such . . . institution to have legitimate educational interests.[120]

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[119] 20 U.S.C.A. 1232g(b)(1)(A)-(I), (b)(2)(B). The ten statutory exceptions are listed in Section 99.31(a) of the regulations:

§99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

(1) To other school officials, including teachers, within the educational institution or local education agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in §99.34;

(3) Subject to the conditions set forth in §99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received; *Provided*, That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number or type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided*, That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in §99.36.

[120] 20 U.S.C.A. 1232g(b)(1)(A).

While the December 31 amendments to FERPA added six of the ten exceptions to the consent requirement,[121] this exception was in the statute as originally enacted. Congress amended the exception, however, by adding the phrase: "have been determined by such . . . institution . . ."[122] The clear intent of this amendment is to place the determination of "legitimate educational interest" with the institution, and not with HEW. Bowing to this expression of intent, the HEW regulations merely require the institution, in preparing its policies and procedures to implement FERPA, to include a statement of whether the institution will use this exception, and if so, to include:

> a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest" . . . .[123]

Thus, through the mechanism of a written statement of policies and procedures, the institution must inform its students how the exception for school officials will be used. But, the regulations avoid any interference with the institution's decisions regarding the "legitimacy" of educational interests its officials may have in seeing a student's education records.

This exception to nondisclosure is a basic necessity for the continued functioning of any educational institution. It permits the institution to use a student's records to make educational decisions about the student, which presumably is one of the primary reasons for the existence of the records in the first place. One of the purposes of FERPA is to "prevent the abuse and improper disclosure of such records and personal data on students,"[124] but it is not a purpose of the Act to prevent the institution from carrying out its educational functions.

C. Disclosure to Federal Authorities

FERPA provides for some access to education records by federal authorities in the absence of the student's consent. The Act permits disclosure to authorized representatives of the Comptroller General, the Secretary of HEW, the HEW Assistant Secretary for Education, the Commissioner of Education, and the Director of the National Institute of Education.[125] Even these officials, however, are limited in their access if the student's consent has not been obtained. Access must be necessary for the audit or evaluation of federally-supported education programs, or be connected with the enforcement of Federal legal requirements which relate to those programs. Information collected must be safeguarded and destroyed when no longer needed for those purposes.[126]

The restriction of federal access to certain named officials and their representatives has led Congress to create an additional exception for the Veterans Administration (VA). The Veterans' Education and Employment Assistance Act of

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[121] P.L. 93-568, § 2(a)(6), 88 Stat. 1861 (1974).

[122] *Ibid.*, § 2(a)(8)(B), 88 Stat. 1862 (1974).

[123] 45 C.F.R. 99.5(a)(3)(i).

[124] 120 Cong. Rec. 14581 (1974).

[125] 20 U.S.C.A. 1232g(b)(1)(E); 1221(b) (Applicability of General Education Provisions Act); 1221e-3(c) (definition of "administrative head of an education agency"); 45 C.F.R. 99.31(a)(3).

[126] 20 U.S.C.A. 1232g(b)(3).

1976[127] authorizes access by the VA to records pertaining to students, regardless of whether the students are veterans, if the Administrator of VA determines it necessary to ascertain institutional compliance with the agency's statutes. The Act's legislative history makes it clear that this provision was specifically designed to prevent institutions from claiming that FERPA required student consent before disclosure could be made.[128] No exception was needed for records of students receiving veterans' benefits since FERPA permits disclosure to third parties in connection with a student's financial aid.[129] The amendment was necessary to permit VA to inspect non-veteran's records which would otherwise be subject to the nondisclosure requirement.

The extent to which other Federal agencies will be able to gain access to education records remains to be seen. In the absence of specific legislation, or interpretation of the existing list of exceptions in FERPA, institutions should be able to successfully resist disclosure to federal officials other than those named in the Act.[130]

D. Studies on Behalf of the Institution

An institution of postsecondary education does not have to obtain the student's consent for disclosures to:

> organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted . . . .[131]

This exception was aimed at a specific group of organizations. As stated in the legislative history of the December 31 amendments to FERPA:

> Organizations such as the Educational Testing Service, the Law School Admissions Council, the College Entrance Examination Board, and the American Medical College Application Service, and others, develop and validate a number of tests which are used by institutions of higher education to predict the potential success of applicants for admission. These and other similar groups need student data in order to perform their function.

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[127] P.L. 94-502, § 510, 90 Stat. 2401 (1976).

[128] S. Rep. No. 94-1243, 94th Cong., 2d Sess. 131-133. Reprinted in [1976] U.S. Code Cong. & Ad. News 5241, 5353-55.

[129] 20 U.S.C.A. 1232g(b)(1)(D). The regulation relating to this provision is quoted in footnote 119, *supra* 45 (C.F.R. 99.31(a)(4)).

[130] HEW's Office of Civil Rights has successfully argued in at least one court that FERPA does not apply to it because of section 400(c)(2) of the General Education Provisions Act, 20 U.S.C.A. §1221(c)(2), the same Act which contains FERPA (in section 438). Section 400(c)(2) states that "nothing in this title shall be construed to affect the applicability of the Civil Rights Act of 1964 to any program subject to the provision of this title." *United States v. Board of Education of Anne Arundel County*, Civil Action No. N-74-1270, Order dated May 19, 1975, and Transcript of Hearing on February 21, 1975 (in author's possession).

[131] 20 U.S.C.A. 1232g(b)(1)(F).

> The amendments would authorize release of such data to those organizations without individual parents' or students' consent, so long as the data are not personally identifiable to the individuals and organizations receiving such data.[132]

As drafted, however, the exception is susceptible to a reading much broader than that suggested in this legislative history. The exception extends beyond organizations which work with predictive tests, and includes others which conduct studies relating to administering student aid programs or improving instruction. The latter category is particularly broad, since most studies in the field of education would have improvement of instruction as at least an ultimate goal.

Further, how can it be determined whether a study is "for or on behalf of" an institution? With the Educational Testing Service as a proper example, the relationship between the institution and the organization which conducts the study may be quite slim. Is it enough if the institution is willing to assert that the study is on its behalf, a totally subjective test? The difficulty with this exception is that the statute provides no objective standards for making a judgment. The HEW regulations are equally silent.

While the lack of standards is troublesome, it may be that the potential damage to the student's privacy interest is relatively small. There at least has to be a study being carried out. The institution disclosing the information must at least be willing to assert that the study is on its behalf. Finally, the Act requires safeguarding the information and destruction when it is no longer needed for the purposes of the study.

E. *Record of Persons Who Request or Obtain Access to Education Records*

Even when an institution of postsecondary education may release education records under FERPA without the student's consent, the student is still afforded protection. The institution must make a record of all individuals, agencies, or organizations which have requested or obtained access and maintain it with the education records of the student. This record of access (and requests for access) must "indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information."[133]

Between the specific language of the Act and the HEW regulations, there are some exceptions to this requirement which limit the burden it imposes on an institution. The Act specifically excepts access by officials of the institution who are covered under the exception to the consent requirement discussed at V.B above.[134] The regulations provide that a record of access also need not be kept where (1) access is by the student; (2) access is with the student's written consent, if the consent specifies the parties to whom access is given; or (3) the institution discloses directory information.[135]

The HEW regulations take a common sense approach to the record of access, and provide exceptions only where there is no lessening of the student's privacy rights. It would be an exercise in futility to keep track of the student's own access, as far as privacy protection is concerned. Similarly, if the student consents to access by a particular individual, lack of a record of that access is not important, since the student can keep a copy of the consent, and in any case is informed of who has had access. The student is protected respecting the exception for directory information in two ways. First, the student can prevent any category of information from being classified as directory information. Second, the type of information is likely to be non-controversial, even if it is disclosed.

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[132] 120 Cong. Rec. 39863 (1974).

[133] 20 U.S.C.A. 1232g(b)(4)(A).

[134] *Ibid.*

[135] 45 C.F.R. 99.32(b).

An argument could be made that HEW is not authorized to add to the one exception set forth in the Act. The balance drawn between protection of privacy and administrative burden seems appropriate here, however, and probably can be implied from the general balancing act performed by the Congress in the December 31 amendments, if not the original law.

F. Redisclosure by Third Parties

A further protection given to students is FERPA's requirement respecting redisclosure of information by third parties. An institution can disclose information to a third party from education records only on the condition that the third party will not redisclose it without the student's consent.[136] The regulations clarify several points regarding this requirement. Information properly disclosed to an institution, agency, or organization may be used by its officers, employees, and agents without the student's consent, but only for the purposes for which the disclosure was made.[137]

Another potential problem with this provision concerns redisclosures to parties who are excepted from the consent requirement. Should the student's consent be required where disclosure is by a third party to another excepted party, even though that consent would not be required if the information was disclosed directly by the institution? For example, if a school releases information to the Office of Education under the Guaranteed Student Loan Program, as permitted by the "financial aid" exception referred to in V.C, above,[138] must the institution tell the Office of Education not to pass the information on to the bank which loaned money to the student under that program? (The bank could, of course, obtain the information directly from the school under the same exception.) If the Office of Education could redisclose the information freely to other excepted parties, there would be no violence done to FERPA's consent requirement. To a large extent, however, free redisclosure would vitiate the requirement to keep a record of access and requests for access. The student would no longer have a means to discover all of the parties outside the school who had access to his or her records without consent.

HEW balanced these interests by authorizing an institution to disclose information with the understanding it would be redisclosed to other excepted parties, but only if the record of access is kept for all of those parties.[139] Therefore, in the situation described above, the institution could release information to the Office of Education with the understanding that it could be redisclosed to the student's bank. The institution, however, would have to make the record of access required under the Act, both for the Office of Education and the bank.

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[136] 20 U.S.C.A. 1232g(b)(4)(B).

[137] 45 C.F.R. 99.33(a).

[138] 20 U.S.C.A. 1232g(b)(1)(D). *See* note 129, *supra.*

[139] 45 C.F.R. 99.33(b).

To what extent must the institution assure that third parties honor its redisclosure condition? Obviously, there is no really effective means for enforcing the condition. HEW's financial ties may not even extend to the third party, and the institution cannot effectively police the third party's use of information. The HEW regulations merely require the institution to "inform" the third party of the restriction on redisclosure. Probably not much more can be done. If an institution learns that the condition is being violated, it could and should refuse future disclosures to that third party, but this is a protection grounded in chance and uncertainty. Unless Congress decides at some future date to provide sanctions usable against third parties, both HEW and the institution will have to rely on their good faith.

VI. Enforcement by HEW—Voluntary Compliance

As mentioned in the introduction to this article, the Secretary of HEW has established an office to investigate, process, and review violations and complaints under FERPA.[140] Under the regulations, if the office cannot secure compliance by an institution, it refers the matter to a review board (also mandated by the Act[141]) which then holds a hearing to determine if Office of Education funding should be terminated. Before the hearing stage, however, the Act requires the Secretary to determine "that compliance cannot be secured by voluntary means."[142]

The practical effect of this requirement will be to allow an institution to violate certain of the Act's requirements, at least once, before it risks the loss of Office of Education funds. In some cases, there will be no way of repairing the damage. For example, suppose an institution discloses information to a party from the student's education records. The student's consent is not obtained, and the party is not within one of the exceptions to the consent requirement. A violation of FERPA has occurred, but what is the remedy? Even if the student complains to HEW, the disclosure cannot very well be undone. Seemingly, under the voluntary compliance rule, the most HEW can do is instruct the institution not to repeat that type of disclosure. If the institution agrees, HEW has achieved compliance, but prospectively only. Of course, repeated violations by an institution after such a warning would be a different matter. Even in that situation, however, if the institution comes to a hearing and contritely promises to reform its practices, could HEW nevertheless cut off funds? The only easy case for HEW will be where an institution adamantly refuses to comply with the Act, an unlikely possibility.

For violations other than improper disclosures, compliance can more easily provide a remedy to the aggrieved student. If a student has been denied access to his or her education records, HEW can require the institution to grant that access. If the institution has not given the student a hearing to challenge the information in education records, HEW can require that the hearing be held. Thus, compliance would assure the particular student's rights under FERPA, as well as those of other students at the institution.

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[140] 45 C.F.R. 99.60.

[141] 20 U.S.C.A. 1232g(g).

[142] 20 U.S.C.A. 1232g(f).

The voluntary compliance requirement is consistent with the strictures in the Act regarding access by the student and disclosures to third parties. FERPA requires that no Office of Education funds be made available to an institution of postsecondary education which has a "policy" of denying (or which effectively prevents) a student from having access to his or her education records.[143] Similarly, the Act denies funds to the institution if it has a "policy or practice" of disclosing information from education records without the student's consent (subject to the list of exceptions).[144] FERPA thus deemphasizes individual acts on the part of the institution, and looks more to its general recordkeeping system. Voluntary compliance fits this approach, since it requires HEW to seek reform of an institution's practices, as well as remedying the complaint of an individual student where possible. The aim of the agency should be to obtain good faith efforts on the part of institutions. To the extent that this serves to avoid hostile confrontations, and encourages a mutual desire to meet the purposes of FERPA, the privacy of students will be better served.

VII. Conclusion

While the December 31 amendments to FERPA and the HEW regulations have done much to resolve ambiguities in the original law, day-to-day implementation by education institutions will continue to surface new questions and problems. No doubt several articles as long as this one could be written even now which treat issues not addressed here.

The interest in privacy is more likely to increase than decrease in a society that seems to become more complex and crowded each year. FERPA, in its context, should continue to be an interesting challenge to HEW and the thousands of institutions responsible for its implementation.

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[143] 20 U.S.C.A. 1232g(a)(1)(A)
[144] 20 U.S.C.A. 1232g(b)(1)

CAUSE

the association for
managing and using
information resources
in higher education

Privacy and the Handling of Student Information in the Electronic Networked Environments of Colleges and Universities

A white paper developed by a CAUSE task force in cooperation with the American Association of Collegiate Registrars and Admissions Officers

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Foreword

Virtually all colleges and universities are learning to deal with the explosive growth of electronic networks, connecting every part of the campus community and linking to colleagues and information resources across the country and around the world.

As an association made up predominantly of information technology professionals, CAUSE has been especially concerned with the impact of such technology on the campus community. We're well aware that many of the issues higher education institutions are facing today stem from the proliferation of campuswide networks and Internet connectivity — issues related to free speech, censorship, student records privacy, ethical standards, managing "institutional information" on the World Wide Web, intellectual property, and copyright. And as campus technology administrators and chief information officers, our members are frequently expected to participate in — sometimes even to drive — campus initiatives to establish policy that addresses networked electronic information resources.

A key set of related issues revolves around the handling of student information, which under the Family Educational Rights and Privacy Act (FERPA) of 1974 enjoys special protection. In recognition that many of our members must deal with these issues, the CAUSE Board of Directors assembled a task force of individuals with diverse perspectives and responsibilities to identify and articulate, through a white paper, the privacy and confidentiality issues that arise regarding access to and transmission of personally identifiable student information in an electronic, networked environment.

Responding to this charge has not been easy. The members of the CAUSE task force found much to debate as they met for discussions that led to the development of this paper, clear evidence that the issues are complex and there are no universally agreed upon solutions. As the work of the task force progressed, new developments and perspectives fostered the realization that this is a moving target. Like the task force, so too will members of campus communities find diverse perspectives with respect to the values of privacy and information access at their institutions. What is important is the discussion and debate.

It is for this reason that this paper does not prescribe what policy should be for every campus with respect to privacy. Instead, it identifies the primary privacy principles involved, recommends a process whereby a full spectrum of campus constituencies can be involved in discussions that will lead to a better understanding of campus culture and values with regard to these principles, and suggests what might represent the lesser or greater application of each principle. In my view, this represents a significant contribution from which all CAUSE members can benefit — thanks to each member of the task force for a job well done!

To support a continuing dialog, CAUSE plans to create an electronic discussion forum for those who read this paper and wish to respond to the issues raised by the task force and their recommendations. For more information about this forum, check the "Hot Links" at the CAUSE World Wide Web site or inquire to info@cause.org.

Jane Norman Ryland
CAUSE President
April 1997

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NOTE: The task force asked a number of individuals with special perspectives and expertise to review this paper in its draft stage. See page 49 for a list of those who provided valuable input in this process.

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I. Executive Summary

There is no turning back from the explosion of innovation and creativity the information revolution represents. Information is a powerful commodity which, used properly, can expedite, enfranchise, and enrich. However, misuse of the power of information can cause harm, especially with respect to individual privacy.

The recent shift to a networked information environment is challenging the protection of privacy in a number of ways. In colleges and universities, the focus on privacy issues has traditionally been on student records and the officials charged with responsibility for them — registrars, bursars, financial aid officers, admissions personnel, judicial administrators. But with the adoption of distributed technology architectures and widespread use of the network as a platform for instruction and student services, others in the campus community have also become stakeholders — faculty, deans, information systems developers, network administrators. And while these individuals may gather and store information generated by and about students or develop student-related technology applications, they may be unfamiliar with the unique legal, ethical, and policy issues related to privacy and the handling of student information.

Other key factors raising student privacy issues are:

- ✓ the increasing creation of information by and about students that does not reside in structured databases but results from systems or technology transactions or electronic communications;
- ✓ the ease with which information in electronic form can be accessed, manipulated, and transported; and
- ✓ the security of student information accessed or transmitted in a networked environment.

As institutions embrace information technology to enhance teaching and learning, streamline business processes, and improve student services, they are finding information technology to be both a bane and a blessing with regard to privacy. There is a delicate balance between the responsibility for maintaining student privacy rights and the responsibility for providing effective and efficient service to students. To preserve that balance, colleges and universities will need to engage in a process that examines basic principles underlying institutional values and policies related to privacy and information access. Enough technological change has occurred in the last several years to prompt a reevaluation of privacy policies created prior to the emergence of ubiquitous network technologies — policies that may have been overtaken by events — for possible adjustments. Or new policies may be needed where none currently exist. While this process should start with the legal implications of the Family Educational Rights and Privacy Act (FERPA) — the very foundation of student information practices — it is also important to consider ethical and policy issues, as well as institutional needs.

This paper recommends using a set of principles of fair information practice as a framework to guide such campus discussions, including:

- Notification
- Minimization
- Secondary Use
- Nondisclosure and Consent
- Need to Know
- Data Accuracy, Inspection, and Review
- Information Security, Integrity, and Accountability
- Education

These discussions should be open and institution-wide, bringing together many different stakeholders to determine campus values with respect to privacy and information access; to balance privacy rights with institutional needs and state and federal requirements; and to weigh the potential benefits of technology applications against the potential risk of privacy abuse.

Higher education as an industry has the unique challenge not only to respond to the cultural change occurring as a result of technological advances, but also to lead that change. Colleges and universities must prepare the next generation to fully understand both the tremendous potential embodied in new technologies and the responsibilities that accompany their use. Understanding the legal, ethical, and policy implications for privacy in a networked environment is an important part of that education — not only for students, but also for faculty, staff, and administrators.

II. Introduction

Seeking new and more effective ways to fulfill their missions, colleges and universities are rapidly increasing their use of computing and communications technologies. Technological advances have opened exciting opportunities to change teaching and learning paradigms — to reach nontraditional students and improve learning in traditional student populations; to create new and more dynamic business systems to increase institutional efficiency; and to deliver student services faster and more effectively.

The ability to deliver education "virtually" through the use of sophisticated communications technologies is breaking down traditional geographic barriers to competition, and many institutions are losing the geographic monopoly they previously enjoyed. In response to these competitive pressures, many colleges and universities are looking to technology to enhance marketability and allow them to reach distant learners.

In response to demands to streamline operations, many campuses are adopting new business models that promise to provide efficiencies and economies — models that cannot be implemented without investing in a campuswide technology infrastructure. For example, one reason many institutions have created distributed, networked environments is to support their strategy of decentralizing administrative functions — such as budgeting and purchasing — to enable more efficient conduct of business.

Most institutions are also exploring methods for giving their students electronic network access to their own grades, transcripts, course schedules, and other information. With students being able to register online, institutions expect to see a reduction in the time it takes students to enroll in classes and to drop or add classes, and a general reduction in paperwork. The goal is to streamline the delivery of student services, making student interactions with the institution more convenient.

The mission of higher education — the pursuit of excellence in learning, teaching, scholarship, and service — requires knowing a considerable amount about students: how well they are performing, where they live, what courses they are taking, and so on. Much of this information is a product of the educational process, some of it is a product of assisting the student with meeting educational requirements, and some of it is a result of simple transactions such as eating in a college or university dining room or checking a book out of the library. This set of information contains elements that an individual student may consider private. Further, associating some items with other items may create new information that may be considered private.

Beyond FERPA

Colleges and universities have an obligation to protect the confidentiality of student information. For more than twenty years, the Family Educational Rights and Privacy Act (FERPA) of 1974 has provided the foundation for handling student information within educational institutions (see Appendix A for a brief overview of this law). At the time of its passage FERPA was, and continues to be, far-reaching legal protection for the privacy rights of students.

That new technologies are being employed or that FERPA provides the legal basis for handling student records is not new. Nor is the fact that privacy violations occur — with or without technology. What is new, however, is the increasing complexity of the issues to be addressed when student information is handled within electronic networked environments.

Issues about handling student information are no longer limited to student records in structured databases such as grades, transcripts, and class selections. Many other pieces of information generated by and about students are becoming increasingly available because of network technology. For example, technology makes it possible to capture, store, and access medical information, digitized and stored photo images, and information about individual students such as their entrance to buildings, use of the library, the times and places they dine, when and where they sign on to computing resources, what they do once signed on, what they buy, and where they use their money cards. Though much of this information was available before the use of computers, what is new is the ease with which such data can be accessed and manipulated electronically by members of the community, and perhaps by others, with both positive and negative ramifications. It is easier to combine databases, to perform automated search and sorting processes, to use data for secondary purposes with no human authorization, and to instantly transport data over electronic networks from one location to another — perhaps without a moment's reflection on the privacy implications of such actions.

Adding to the complexity are two other factors:

- the increasing distribution of student data and decentralization of authority for its protection. In today's networked environment, control of this information is no longer solely in the hands of the registrar and other academic officers, but is shared by others who may be unaware of privacy considerations in handling student information.
- the fact that process decisions (how systems work and how access controls are managed) and tool decisions (how information is formatted, displayed, and presented) are often based on purely technical criteria, sometimes without input from the "stewards" of the data that are to be managed within those systems. Privacy and security issues are often addressed as an afterthought. In the words of one registrar who provided input to our task force, " ... the responsibility for technology applications rests with people who have not had to be concerned with privacy and compliance issues."

An understanding of privacy is no longer limited to the legal implications of FERPA. Many colleges and universities recognize the need to also address the ethical and policy concerns that arise in a networked environment. New technologies are exposing campus administrators to a barrage of inquiries, demands, and complaints: "What is your policy in the area of X?" "I object to the use of personal information Y." "Please provide extract Z from your online database." Without comprehensive, carefully considered policy, the need for case-by-case decision-making will turn into an impossible burden.

The implications of networked technologies on the privacy of students, on the handling of personal information, on tradeoffs between privacy and service, and on the management of relationships between institutions and individuals are of such critical importance that they must be systematically examined by people with a diverse range of responsibilities institution-wide.

Notes another registrar, "A primary issue on our campus is the conflict between the values of privacy protection, convenience, control, and flow." Policy regarding privacy and networked information resources should be determined at an institutional level, and can no longer be determined by any single campus department. In their 1995 book, Alderman and Kennedy wrote:

> Whenever an invasion of privacy is claimed, there are usually competing values at stake. Privacy may seem paramount to a person who has lost it, but that right often clashes with other rights and responsibilities that we as a society deem important.[1]

This is at the heart of the dilemma facing colleges and universities. There are significant compelling, yet often competing, forces as they try to make decisions about how to move forward in implementing information technology. Tradeoffs and compromises must be considered. However, rights and responsibilities do not need to be at odds. Protection of privacy, enabling autonomy and intellectual freedom, and promoting civilized behaviors are important to communities of higher education and to learning communities in general, and new technology advances can provide assistance in such efforts. How can colleges and universities meet those objectives and take advantage of technological advances to meet institutional needs at the same time?

This paper was developed by a task force commissioned by CAUSE, the association for managing and using information resources in higher education, in cooperation with the American Association of Collegiate Registrars and Admissions Officers (AACRAO). The purpose of the paper is to:

- provide the reader with a framework for identifying and understanding the issues surrounding privacy and the handling of student information in an electronic networked environment,
- stimulate the clarification of values within institutions by encouraging discussion of privacy and technological issues, and
- provide guidance, resources, and a process for examining and creating policy to guide practice.

In developing this paper, our task force chose to look beyond the letter of the law to examine ethical issues and information policies and practices not explicitly covered by existing laws.

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[1] E. Alderman and C. Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995).

The paper first examines new technological advances and ways they present both opportunities and pitfalls for privacy in the academic environment; then identifies eight principles our task force believes are important to policy development and fair information practice; and finally suggests a process that campuses can use for values clarification and policy development. Several appendices provide supplemental information including an overview of FERPA, definitions, recommendations and a checklist for policy and practices, additional information principles, information about sources of input to the task force, references, and resources.

III. Privacy Issues in an Electronic Networked Environment

Twenty years ago, except perhaps for a few scientists, people did not have computers in their homes. Similarly, only a few short years ago if someone had used the term "World Wide Web" one might have thought of spiders, or a creation by E. B. White. Yet today these are integral and irreplaceable elements of everyday life. There is no turning back from the explosion of innovation and creativity the information revolution represents.

While networked environments challenge the protection of privacy, they also afford opportunities to enhance privacy. Before examining in greater detail such challenges and opportunities, a brief discussion of the concept and importance of privacy is in order.

Throughout this paper, we refer to privacy as a right of individuals to control personal information about themselves (a right that in many instances is limited by other considerations). That right includes an opportunity to inspect information about themselves held by organizations and an expectation that the information will be accurate. We refer to confidentiality as the property, or characteristic, of information that is kept secret and secure. Organizations obviously have an interest in keeping information about themselves confidential, but, strictly speaking, that is not based on a right to privacy, which is an individual right.

The Importance of Privacy

Why is this individual right to privacy important, in particular to students on college and university campuses? Privacy is the foundation of the intellectual freedom that is critical in higher education. Especially critical for the growth of students is the ability to freely explore and communicate ideas and to be totally honest in forms of expression. Conditions must exist in which these activities may take place without stigmatization and without later consequences for participating in this world of ideas. Colleges and universities have a responsibility to create and to protect these conditions to facilitate and encourage the intellectual growth of students.

College is also a time of transition, pressure, and dramatic intellectual and emotional growth for most students. It is the time of breaking away from known protected environments, when students find themselves in unfamiliar territory. It is a time of exploring new social and intellectual environments in which they begin to define for themselves their more independent identities and routines. During this often unstable and vulnerable time, students may be unduly sensitive about their heritage, their strengths and weaknesses, their families, the look of their bodies, their disabilities or illnesses. Providing an environment where privacy is possible and information about themselves can be controlled eases one of the many pressures of campus life.

In a learning environment, students need to be independent — to have a sense of autonomy in asserting their beliefs, ideas, and values. Privacy is the foundation for such self-governance and autonomy. Without the ability to control and release information about themselves at will, students can become more vulnerable to the desires, assumptions, and power of others. They may also be hurt economically, educationally, socially, or psychologically by information theft or misrepresentation. The incident below illustrates how information can be used to draw assumptions and perhaps to disadvantage an individual, reducing his or her autonomy.

One of the largest distributors of credit cards in the country at one time had the practice of routinely denying credit cards to students majoring in history, English, and art. They made the assumption that these students would be less likely to repay debts because they would not receive high-paying jobs. When a student who had received a credit card while majoring in math was denied a card because he had changed his major to rhetoric, the practice came to the light of public scrutiny.

Privacy is especially important to students until they have gained sufficient autonomy, knowledge, and experience to make reasoned decisions about the actions they wish to take and are prepared to suffer the consequences of those actions.

Technological Advances: Privacy Challenges

Several existing or emerging technologies that have great potential for improving the way higher education serves students also have implications for their privacy rights. The discussion that follows illustrates the privacy issues that can and do arise in the context of deploying these rapidly emerging technologies, including real-life incidents that have occurred in colleges and universities. While the nature of privacy violations hasn't changed, network technology has changed the magnitude of potential damage, thus making it necessary to consider old problems in a new light.

The Internet

The Internet is a combination of international, national, state, and local electronic networks that enables people around the world to rapidly and easily access and exchange information. Internet privacy issues relate in part to the structure of the Internet itself and in part to its breadth and speed. The instantaneous and global nature of electronically networked communications magnifies simple errors. It is possible to transmit sensitive information, whether by accident or malicious intent, to a global audience in seconds, without ever being able to retrieve the information, rectify the error, or even stop its unlimited retransmission, as illustrated by the incident that follows.

In 1994, a midwestern university student sat at a public computer to read his electronic mail, unaware that a Trojan horse program had been placed on that machine. The program, though appearing to be a normal sign-on screen, captured and stored his password. Only days later, a racially offensive and threatening e-mail message was sent over the Internet to thousands of users under his name by the person who had captured and stored his password. The racist message appeared to be coming from the student, and he became the target of thousands of angry and threatening messages in response to the racist content. Though it was later proved that the individual whose name appeared on the message did not send the message, he is still plagued by individuals who continue to find the message living in cyberspace and become outraged. The student is the focus of complaints and continued suspicion because his name has been widely associated with this racist content.

Threats to privacy on today's Internet have in part grown out of its origins. Participation in early networking activities was limited to research centers at colleges and universities and government development facilities. The original Internet was designed to facilitate the widest possible sharing of information, so the security measures essential to protect privacy were not emphasized. With access to the Internet available to the general public, and with its extremely rapid growth, there is an increasing awareness that the weak security practices inherited from the network's early culture urgently need to be addressed.

Fortunately, technologies supporting secure transmission of data over the Internet are now becoming available, and institutions of higher education are beginning to deploy them. (See the discussion below, beginning on page 10.) The effectiveness of these technologies will be limited, however, until their use is widespread and standardized. Institutions concerned about the security, privacy, and accountability of information sent over the Internet should both install appropriate systems on their own campuses and get involved in network-wide activities to promote the standardized use of these systems throughout the Internet.

Higher education communities need to be cautious and thoughtful in the way they use the Internet, especially in implementing network-based applications that require confidential handling of student information. In addition, colleges and universities need to establish and promote institutional standards and policies to support and guide the use of networked information resources and technologies. Without such widely understood guidelines in place, privacy violations such as the one that follows can and do occur as a result of ignorance.

An economics professor at one of the Big Ten schools decided to post the final grades of his students, using their student ID numbers (Social Security number plus one digit) as identifiers, on a local Gopher server, not realizing that the information would be accessible from any place that had an Internet connection. Students were not happy with this use of technology for posting their grades and, coincidentally, their identification numbers (SSN+1) to the Internet community.

Electronic mail

Electronic mail is a technology that is almost universally desired and one upon which colleges and universities increasingly depend. If an e-mail server is down for even a brief time, the immediacy of the outcry from users illustrates the importance of the technology to most of the campus community.

The threats to privacy related to electronic mail on networked mail systems are many. The primary issue involves the nature of e-mail itself. Is e-mail more like a phone conversation (for which records are not maintained and which is considered private, with laws to protect privacy), like sealed letters (which are subject to records retention acts and policies, for which there are strong laws protecting against intrusion as well as a strong tradition of respect for its sanctity), like post cards (for which there is sanctity protected by law and tradition but which everyone understands may be seen by prying eyes), or like a bulletin board (for which there is no expectation of privacy at all)?

The law has not yet given the community definitive guidance on this issue. The answers to these questions in some ways dictate how electronic mail will be treated by the institution. Unless an encryption technology is used, e-mail is not assured of confidentiality. Once sent, it may pass through a number of intermediate systems before reaching its final destination. At any point along the journey, it has the potential for being intercepted, read, stored, modified, destroyed, or forwarded. To a degree, of course, all of these deficiencies also apply to traditional paper mail. In the world of e-mail, however, the abuses may be carried out by a much wider range of individuals, and without any telltale traces left behind.

Differences in expectations regarding ownership and handling of e-mail messages is another issue. These can arise as a result of cultural differences among users and systems managers, and/or the lack of policy defining the status of e-mail as confidential or public record, as in the following incident. Institutional policy is needed to spell out standards for handling e-mail by system administrators, technologists, and members of the community — that is, will e-mail be handled and managed as confidential?

A system manager at a university medical center, receiving complaints from male employees that a female student was using the e-mail system to solicit sex, decided to take matters into his own hands. He reasoned that as a manager he had the responsibility to see to it that the e-mail system was used appropriately, that is, for the conduct of business. Employees understood the system to be for all of their uses, social and interpersonal, though primarily for work-related uses. The manager intercepted all messages to and from the student daily and reviewed the content of those messages for evidence of wrongdoing. Once the manager's practice was reported to university officials, he was informed that his actions must be stopped as they violated good management practice, ethics, the privacy of all of those who unwittingly communicated with the woman, and possibly the law (Electronic Communications Privacy Act, 1986).

Another issue regarding e-mail occurs when it is implemented without technologies in place that will authenticate the sender and protect against forgery. In such circumstances, it may be impossible to know who the actual sender is, as in the following incidents.

Two universities have reported forged mail purporting to come from their president with the obvious confusions on the part of the recipient. At one eastern university, mail which was sent to the president, supposedly from the director of housing, announced his resignation. Before the president could be informed that the mail was a forgery, the resignation was officially accepted. At another university, a forged electronic mail message posted in the name of a professor cancelled a final examination, causing students to miss the test.

Still another issue regarding e-mail is its permanent nature. When an individual deletes a message and believes that it no longer exists — assuming that the recipient also deleted the mail and did not forward it — has the message really been deleted? Even from backups and archival copies? Policy regarding what should be preserved and saved as official correspondence and part of professional duty within institutions should be established. Such policy relates to the fair information practice of minimization, discussed on pages 15-20.

Institutions should consider the nature of e-mail when addressing what types of information are appropriate for transmission via this medium. Until more effective host and network security methods are in widespread use, the technical realities of this technology may cause it to fall short of the campus community's expectations, policies, and standards. Encryption technologies (see page 11) hold promise for ensuring the confidentiality of electronic communications, if they do not prove too cumbersome for routine use.

World Wide Web

The World Wide Web, a network of servers on the Internet that provide information and hypertext links to other documents, allows audio, video, graphical, and textual content to be transported, accessed, and exchanged worldwide. The Web has already found a role in student information services. Comments one registrar, "For enrollment management, the Web allows colleges and universities to interact with students and prospective students in a totally different way. It allows them to find out information about the college in which they are particularly interested in much more depth than a hard-copy publication."

Along with the beneficial uses of this technology come a few privacy implications for those who use it. One concern is the ability of Web browser software to "cache" (temporarily store) information that has recently been viewed. When student records are accessed via a Web interface on a public microcomputer, the next person to use that computer may be able to view previously loaded information, depending on the system design or configuration. It is also the case that the various Web locations visited by the user of a computer are cached and, as in the incident below, this cache can be viewed by anyone with access to the computer.

A residence hall administrator at one midwestern campus found that students knew little about the records their Web browsing activities automatically stored on their machines until an incident occurred. One student wishing to discredit another entered his dormitory room, accessed the Web cache on his machine, and then proceeded in public forums to announce what information the student was reading and how often he was accessing it. The student was publicly embarrassed and ridiculed.

Online monitoring and tracking by network systems (see sidebar, page 18) is usually employed to efficiently manage systems and ensure against overloads and breakdowns, but the monitoring tools may be used for other purposes, as well, some of which may constitute misuse. For example, the tools might be used to construct detailed logs of an individual's behavior — such as the network sites s/he visits or the applications s/he uses — thus creating new personal information about this individual. Even if the use is not intended to hurt specific individuals, the threat of embarrassment may have a chilling effect on their use of the system if the practice of monitoring or logging transactions is not managed to protect privacy, as in the following incident.

> Twenty-eight graduate students employed as teaching assistants at an Ivy League university were shocked to discover that the campus network system permitted other users to see a list that revealed they had downloaded pornography. Apparently, the transmission of electronic mail and the transfer of files from the Internet were regularly recorded in a public log in the system, which is used throughout the university by faculty and students.

This issue is analogous to the long-standing privacy issues surrounding library circulation records, and more recently records of purchase or rental of videos. Policies regarding such logging and monitoring activities and the information maintained in such logs — information that, if personally identifiable, is part of the student record — should be in place to guide such practices.

Organizational practices involving the Web may also violate individual privacy. For example, administrators may require publication of student information on the Web that students may consider personal and wish to restrict to campus viewing. Institutions should encourage thoughtful discussion of both the positive and potential negative effects of using the Web, to help develop policy in this area.

Another concern in this context is use of the Web for the collection and transport of confidential information. College and university administrators want to be able to share information (such as testing and transcript information) easily between institutions and to gather admissions and financial aid information easily and quickly from individuals all over the world who wish to apply. The online environment holds remarkable promise for such activities, but it is important to consider privacy expectations when evaluating what information to request or disseminate via the World Wide Web, and what level of security is needed to provide what the institution deems reasonable assurance of privacy protection.

Digitized signatures

Digitized signatures are image replicas of the individual's own handwritten signature obtained during a signing operation. (The pads/signature recording devices beginning to be employed by major department stores and express delivery services are an example.)

Digitized signatures should not be confused with digital signatures, one of a number of technologies that enhance security in a networked environment (see discussion about encryption, page 11). Many institutions are considering, or have implemented, procedures for collecting digitized signatures.

Some colleges ask faculty, staff, and students to provide digitized signatures to include on identification cards for confirming identification when purchases are made or checks signed. Others capture and store digitized signatures, rather than paper forms, to improve the efficiency of routine processes.

There are advantages and disadvantages to this process. The advantages are a reduction in the amount of paper and staff time needed to file, maintain, and retrieve documents that require an original signature. The downside of stored digitized signatures is that their unauthorized use would constitute a forgery with exactness never before possible. Colleges and universities electing to use this technology need to consider the security of the system and the storage medium employed, as well as the procedures for collecting the signatures.

Digitized photographs

Digitized photographs are simply that — photographs that have been converted into digital form and placed on a computer for storage and reproduction. There are many interesting uses that can be made of digitized photos. Photographic directories of classes of students can be made for faculty members, helping them to more quickly learn student names and to confirm the identity of individuals in their classes and those taking class examinations. Photographic departmental directories can be created, helping departments form communities and helping faculty, staff, and students get to know each other. Digitized photos can be electronically submitted with graduate school applications, employment applications, and letters of introduction to expedite the application process.

As illustrated in the incidents described below, however, some students consider photographs to be personal pieces of information and may wish to have them treated accordingly. Institutional issues associated with digitized photos include determining when and why images of students are required, how images of students will be stored and secured (to prevent alteration, misrepresentation, or misuse), and who may access them. Should an administrator require individuals to place their image into "cyberspace" for access by unknown individuals? Should prospective employers have access to photos of students or others? Institutional policy should address these and other issues related to digitized photographs of students.

Incidents occurred in 1996 in which students complained because their digitized photographs were transmitted on departmental Web home pages without their informed consent. In one case, the department required all students to have their pictures taken for transmission on the Web page with no opportunity to opt out. In the second case, students believed their pictures were being taken for use within the university community only. In a third case, graduate students who were unhappy about being ordered to have their photos taken for Web display nonetheless complied because they knew the dean favored this use of technology and they were afraid to refuse. In all of these cases, the students who objected to the practice expressed discomfort because they felt more exposed and accessible to strangers, and feared for safety due to what they saw as unnecessary use of their personal image. Other students at these universities, however, have created personal home pages on which they have enthusiastically included their photos. The difference is a matter of personal choice and control.

Desktop video

Networked video at the desktop is technology that holds tremendous potential for education. This technology combines video cameras for images and sound, computers for access and delivery of information, and networks for transporting the images, sounds, and textual information. It can provide this combination to many different locations on a campus, nationally, or internationally with the speed and ease of the Internet. Combining sources of information from the computer, the Web, live video, audio recordings, and written information, creative presentations can be merged and sent over the campus network to residence halls throughout the institution. Special service announcements, event notices, special interest programming, and classroom presentations can be simultaneously transmitted across campus.

As with other technological advances, with positive opportunities for collaboration and creation also come opportunities for abuse of privacy. In addition to deliberate abuse, such as one individual observing or broadcasting another individual's behavior without his or her awareness, authorization, or consent, there is the possibility for unintentional privacy violations. As this technology becomes more common, unless new mechanisms are developed to notify users when broadcast is occurring, individuals may forget that the desktop video broadcast capabilities are turned on and discover that what they thought was a one-to-one exchange with a colleague in an office was really a broadcast discussion over the campus network.

Electronic Data Interchange

Electronic Data Interchange (EDI) is the computer-to-computer exchange of electronic information in a standardized format. The standardized formats, or transaction sets, are developed through the American National Standards Institute (ANSI). Using special software, information is retrieved from the computer, placed in the standardized format, and sent usually via a network or phone modem. The receiver takes the formatted information and filters it through special software and into the appropriate file(s) in the computer.

For years the business community has been exchanging such things as purchase orders, invoices, and inventory information. In 1992, ANSI approved a transaction set (TS 131) for a Student Educational Record, developed by the SPEEDE (Standardization of Postsecondary Education Electronic Data Exchange) task force commissioned by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). Since that time a number of other education-related transaction sets have been approved, including Application for Admission, Verification of Enrollment, and Test Scores. Several hundred postsecondary institutions are currently electronically exchanging student information using SPEEDE standards. Among the many advantages are speed, elimination of data entry and data entry errors, and elimination of postage costs.

However, EDI presents a number of privacy and protection issues for institutions that exchange information electronically, especially when the exchange is transmitted via the Internet. While the business community has heretofore utilized private networks or VANs (value added networks), availability and cost have made the Internet an obvious choice for EDI for postsecondary institutions. Thus the issues facing institutions that choose to use the Internet for EDI are much the same as the issues already discussed for this transmission medium — information security (whether the information should be encrypted and at what level), authentication (how to ensure that the information received is authentic rather than fraudulently created and transmitted), authorization (how to ensure receipt by the appropriate office), and integrity (whether the information has been intercepted and altered by an unauthorized party).

Data warehouses

Data warehouses are fast becoming a standard information resource at colleges and universities, providing tremendous access to information, both in terms of volume and speed. Essentially a data warehouse is a database containing information extracted from one or more production databases. For example, a data warehouse might contain information extracted from a student records database, a human resources database, a financial database, etc. Not only does this eliminate the need for several separate requests for data, but it also provides faster and easier access to information than is typically the case when requests are made to production database administrators.

Data warehouses are often housed in a client/server environment, making information access and utility far easier than in the past. Academic and administrative units can quickly access their data for a variety of tasks ranging from running labels for their enrolled students to performing high-level decision-making and analysis. People and departments requesting access to data warehouses point out that often the information sought is owned and maintained by the requester to begin with. In fact, one of the frequently cited benefits of a data warehouse is that it often results in "cleaner" data. Information owners can easily view and utilize their data warehouse information, and they are quick to correct errors in the production database.

However, this powerful information resource also presents significant challenges related to security and proper use. Ensuring that specific information is viewed and retrieved only by the appropriate parties becomes more difficult with the amount and variety of information housed "under one roof" in the data warehouse. Ensuring that the meaning and attributes of the data are clearly understood by users is essential in order to eliminate the possibility of inaccurate or misleading analysis and decisions. Clear policies regarding what information may or may not be appropriate in the data warehouse must be established. Secure communications must be in place before users have access to data in the warehouse. This is especially true in view of the fact that most access to data warehouses is via the campus network.

Data warehouses present an exciting resource and tool for more informed decision-making and analysis, but they also present very significant challenges to proper use and access to information.

Technological Advances: Privacy Opportunities

A number of other rapidly developing technologies may hold the keys for greatly *improving* personal privacy, while facilitating access to information in a networked environment. Such "security" technologies are the essential element that will enable the types of distributed information interchange that colleges and universities seek without compromising users' fundamental privacy.

There is no single security strategy that will apply universally to all institutions and all environments. Rather, each institution will need to develop sound security strategies that integrate emerging security techniques and technologies effectively in the context of its own unique environment. Several security technologies may be effective, now or in the future, depending on the institution's specific network architecture and needs.

Firewalls

Firewalls are methods or devices that restrict access between a trusted internal network and an untrusted, or public, network. While firewalls are perhaps not as widely deployed in universities as in corporate environments because the user base is quite different (for example, not all users are employees on LANs or workstations that are assumed to be trusted), firewall technology can be used to good effect for certain areas or applications. For example, firewall technology may be applied for administrative or medical networks, or at either the main Internet interface or the college or departmental level.

Encryption/digital signatures

Encryption is basically "scrambling" some or all data in ways that are computationally secure, turning plain text into cipher text. Encryption is fundamental to protecting the confidentiality and integrity of personally identifiable information when it is being transmitted through untrusted or public networks because of the ease with which unencrypted data can be intercepted, rerouted, or modified while en route. Two common methods of encryption are public-key encryption and private or secret-key encryption.

In public-key encryption, there is an element of the encryption process that can be known by all — the user or service's public key. There is also an element that is private and cannot be shared — the user or service's secret key. If one, for example, wishes to send an encrypted message to someone, s/he encrypts the message using the recipient's public key, but the recipient can only decrypt the message using the secret key known only to him or her. Public-key technology is frequently associated with digital-signature technology since the user can "sign" a piece of correspondence with his or her secret key and the validity of the signature (and hence integrity and source of the correspondence) can be verified by the recipient with just the public key of the sender. An example of public-key encryption technology is Pretty Good Privacy (PGP).

Private or secret-key technology relies upon a shared secret. If something is encrypted with a particular secret key and transmitted, only a user or service that knows or holds the same secret key can decrypt the message.

Today, secure Web server technology and other applications are making use of cryptography to verify "digital certificates" associated with various clients, servers, or users. A digital certificate is a statement about the identity of an object (for example, a person or service) signed by an independent and trusted third party. A certificate generally contains three elements: subject name and attribute information, which describes the object being certified (perhaps the individual's name, e-mail address, or work unit); public-key information, which provides the public key of the object being certified; and finally the Certifying Authority (CA) signature. The CA cryptographically signs the attribute and public key information. Those receiving the certificate can check the signature and accept the attribute and public key information if they trust the particular CA. S/MIME, a method for secure electronic mail that will be employed in most standard browser software, relies on digital certificate technology. There are a number of complex issues surrounding establishment of a certificate authority hierarchy with which institutions will need to become familiar and address in their planning processes in the near future.

Employing authentication technology will help to prevent incidents like the following from occurring.

> The 13-year-old daughter of a hospital records clerk in Florida used her mother's computer on an office visit to print out names and addresses of patients treated at the emergency room, and then, according to police, went home and telephoned seven of them to tell them falsely that they were infected with the HIV virus. Upon her arrest, the girl told police that this was just a prank. One person attempted suicide after the call, and all of the victims were severely upset.

Middleware technology

Kerberos is a protocol developed at MIT that facilitates trusted third-party authentication. In other words, users and services are authenticated to one another based on essentially a mutual "introduction" by a source that both trust — the Kerberos server. The protocol makes extensive use of encrypted tickets for services, and user passwords are never sent across the network, even in encrypted form — they are only entered at the individual user's workstation. Kerberos uses the secret-key encryption methodology which relies on a secret shared between principles (for example, users or servers) and the Kerberos server.

The Distributed Computing Environment (DCE) is a collection of middleware services that expands upon Kerberos capabilities (which are limited primarily to authentication). DCE Security Services include authentication, authorization, and privacy (encryption) options.

Thus,using DCE it is possible not only to mutually authenticate users and services but to establish granular control over what a user will be able to see or modify.

There are a number of shortcomings with both Kerberos and DCE, but they do address some of the more complex problems with network-related security in large-scale, heterogeneous environments.

Some institutions are forming partnerships to work toward solutions using these technology environments, such as the members of the Committee on Institutional Cooperation (CIC), the academic equivalent of the Big Ten athletic conference. CIC universities are working with the Open Software Foundation to develop a Web-based authentication and authorization mechanism that maps any institutional security realm to a DCE security environment which in turn provides for the encrypted transmission of information across the Internet. The goal is to allow users to make use of a Web browser of choice to move information across the Internet encrypted from end to end. This Web client will be used first to allow faculty, staff, and students at one institution to access licensed material stored on a server at another institution. The second application will be for the creation of a buying consortium among CIC institutions, so that faculty and staff can order materials from an electronic catalog and arrange payment via corporate credit cards. One can imagine the future use of the secure Web client for the transmission of student information from one institution to another across the Internet.

Token cards, smart cards, and one-time passwords

Token cards, smart cards, and one-time passwords are designed to help overcome the vulnerabilities associated with reusable passwords. With a token or smart card, authentication to a computer or network resource is based not only on "something you know" (a user ID and password), but also "something you have," the card itself. Tokens may operate in various ways, for example by calculating a response to a challenge issued by the server, or by providing a unique time-based number that the user furnishes to the server. A smart card may contain various items of information that are unique to the user that can be used in the authentication process. The primary necessity is that the authentication sequence cannot be completed unless the user is in physical possession of the card, and the exact information the card holder supplies during authentication is not repeated in subsequent sessions. Therefore, "sniffing" (capturing) the information does not allow the intruder access to the service at some later date. One-time passwords are based on the same basic philosophy — that authentication must be unique each time. But they may not require a hardware device. An example of a one-time password implementation is S/Key.

Biometrics

Biometric technology, such as voice recognition, fingerprint matching, or hand geometry can be used to authenticate the user based not on something he knows or something he has, but rather by a physical characteristic that cannot be changed. While biometric technology is still relatively expensive, as it becomes less costly and more computing power is available to support it, biometric authentication may become practical for some college or university environments or applications.

These technologies illustrate that it is possible to resolve many current security-related privacy concerns, but it will take creative, well-planned, integrated application of security technology to do so. Colleges and universities should begin planning for the future security architecture in order to enable both open *and* secure applications. It need not be an either/or decision.

Balancing Technology Benefits and Threats to Privacy

Prior to implementing new technologies, colleges and universities should carefully explore both their potential misuses as well as the opportunities they afford, balancing the individual right of privacy against the benefits to the institution in each application. Colleges and universities do not make decisions about using such widespread technologies as e-mail and the World Wide Web in a vacuum; they function in a world where many other players and external forces — government, private sector, and public demand — influence the ways in which they apply technology. The external environment also shapes what is considered an "acceptable risk" and this will differ from campus to campus. Some tradeoffs may need to be made in creating institutional policy, tradeoffs that only a broad set of campus stakeholders working together can best determine.

As institutions redefine how they process, store, display, and disseminate student information and student-generated information, they will also confront potential individual student desires for limiting release of specific information about themselves through electronic networks. In responding to rapid technological change, consideration must be given to the effects of such change on the concept of consent. Twenty years ago, students gave consent for private information to be collected and released by the institution with the understanding that the information would be kept on cards or microfiche and only accessed manually by authorized personnel. Today, the same information is often available in relational databases, retrievable instantly over electronic networks and on individual machines that might have their electronic locks tested by anyone in the networked environment. Thus the basis for consent may change based on technological innovation alone.

Used to its full potential, technology can empower both ends of the spectrum — those students who desire to control the electronic release of any information about themselves and those who see positive advantage in releasing most, if not all, personally identifiable information. The challenge for information technologists is not just to provide access, but to do so within the parameters of a well-defined institutional policy on privacy and information access. Where a new technology introduces a privacy concern, the tradeoff between ease of use and ability to keep information confidential should be clarified and decided where possible with input from the people affected.

In summary, colleges and universities have a responsibility to purposefully reexamine and define their values and institutional needs with respect to the implementation of new technologies and their impact on privacy; to employ fair information practice that reflects those values and needs; and to make decisions about technology deployment within this framework. The next section explores fair information practice, especially in the context of networked information environments.

IV. Principles of Fair Information Practice and Policy

Policies on privacy and the handling of student information in networked environments should rest on a firm foundation of principles of fair information practice. Such policies play a significant role in promoting coherence across the institution by providing clear rules and procedures for student information management.

While much of the legal foundation of such policies is derived from FERPA, the ethical foundation is derived from the values of the college or university. The process of creating policies often requires a reexamination of these values, to reaffirm or clarify them, and that exercise may uncover strong feelings in the academic community. Thus all stakeholders need to be involved — student services and other administrators, faculty, students, staff, legal counsel, and technology professionals. (See pages 34-37 for examples of policy-building strategies and processes.)

This section outlines eight relevant principles of fair information practice that our task force believes provide a framework for evaluating campus values and creating policy with respect to privacy and access to information in a networked environment:

- ✓ Notification
- ✓ Minimization
- ✓ Secondary Use
- ✓ Nondisclosure and Consent
- ✓ Need to Know
- ✓ Data Accuracy, Inspection, and Review
- ✓ Information Security, Integrity, and Accountability
- ✓ Education

These principles, though variously titled in the literature, have been recognized over years of legislative intent, action, and implementation as the foundation for sound information practice. Documents such as the *IITF Principles for Providing and Using Personal Information* and

European Directive on the Protection of Personal Data have been useful resources (see Appendix H for others).

To aid policy development in the academic community, this section provides a definition of each principle, notes relevant law and its implications for practice, and provides examples of practices that illustrate lesser and greater application of the principle. A variety of issues are identified, especially those that arise in a networked environment, that institutions need to address in establishing policy or procedures.

The Principle of Notification

1. Definition

The notification principle provides that students be informed of *what* information is being collected; *who* is collecting the information and *from whom* it is being collected; *why* the information is being collected (i.e., the intended use); *what steps* are being taken to protect the confidentiality, integrity, and quality of the information; the *consequences* of withholding information or of providing false or incomplete information; and any *rights of redress*, such as inspection or challenge. These elements of the notification principle provide the basis for knowledgeable actions when individuals are asked to give consent for others to have access to their information. Without solid knowledge, consent can be hollow instead of informed. This is what is meant by informed consent.

Notifying students of the gathering, storing, and responsible management of information is essentially an awareness activity. In their rush to complete admission, orientation, registration, and financial aid paper work, students may be unaware that data are being collected about them. As a result, they may not take time to consider or question staff about such issues as disclosure or use of their data. If students are notified of where the information is being stored and under whose authority it is being collected and managed, they will have the opportunity, at a later date, to check on the accuracy of the information and provide updated information when appropriate to the collecting office.

Note that the notification principle applies to information collected both from and about the student. The means of notification will be different in these two cases, but the principle remains the same.

2. Relevant Law

FERPA requires each institution to inform students annually of their rights of privacy and access under the law and to give public notice of the categories it has designated as "directory information," that is, certain information about students (such as name and address) that may be made public without consent unless the student objects.

3. Policy Issues

Within the electronic environments of colleges and universities, notifying and informing students is a process that may become increasingly problematic. In such environments, information is being stored and transported between many different offices, on a continual basis. Questions concerning notification frequency, intensity, and granularity and scope will need to be addressed in building policy about handling student information in this environment.

Frequency

An institution must notify students annually of their privacy rights under FERPA. Many institutions publish such notifications in registration materials. But this may no longer be adequate in a world of dynamic technology, where new databases, information paths, and security systems are being created, modified, and recreated continuously. This same dynamic technology can be used to automate and facilitate the notification process; for example, e-mail messages and the Web could be used to deliver such information.

Intensity

How active will the institution be in ensuring that students have received and understood their notifications? Is a fine-print footnote on a registration form adequate, or should each student receive a personalized letter? Should students be required to positively acknowledge — by signature or other means — receipt of this information?

Granularity and Scope

With the increasing demise of host-based computing, student records are often no longer housed in and controlled by a single central system. In a distributed computing environment, to what extent should students be notified of each record's distinct usage, security, and

Examples of the Principle of Notification

Lesser Application ⟷ **Greater Application**

Lesser Application

- ☆ The institution provides annual notification information in the student handbook. That notification includes information about students' rights to privacy and about what information the institution has identified as directory information.
- ☆ Students are not informed that data are being collected as a function of system transactions.

Greater Application

- ★ Students are notified and informed each time personal information is collected and told the purpose for which it is being collected.
- ★ Students are notified of the office under whose authority their information is being managed and maintained, as well as any secondary offices to which the information might be distributed.
- ★ Students are informed of the existence of any personally identifiable system transaction data.

other characteristics? How much detail is it reasonable to provide before the volume itself becomes an impediment to true understanding?

4. Task Force Recommendations for Notification

◆ Institutions should notify students of their privacy rights with the same prominence and frequency afforded other important areas of campus life, such as residence-hall regulations, course descriptions, and meal-plan options. A useful comparison may be made between notification of campus judicial system regulations, which focus on student responsibilities and punishment, and notification of privacy policies about student records, which focus on student rights and abilities.

◆ The institutional approach to notification should also take into account the technological sophistication of the student body. This and other local considerations should be applied in order to provide useful and meaningful information to students. An effort should be made to avoid overwhelming detail on the one hand and overly vague generalities on the other.

◆ When formulating policies and procedures concerning student notification, campuses should consider the effects of the distribution of databases to non-centrally controlled systems, as well as transaction and tracking data maintained as a by-product of daily operations. Policy should determine how students can be informed of the existence of such databases and systems.

The Principle of Minimization

1. Definition

The principle of minimization relates to what kind and how much information is collected from students, with an emphasis on gathering the minimum amount of relevant personal student information needed to accomplish a legitimate, identified institutional purpose. Associated with this principle is the responsibility to delete information when it is no longer needed. The challenge is for an institution to identify those elements that are truly the "minimum" needed, avoiding collection for collection's sake or for "potential future use."

2. Relevant Law

A number of laws proscribe collection of certain information. The federal Privacy Act requires that agencies of state and local government not deny a benefit to an individual for failing to provide a Social Security number unless prior to 1974 there was a law or regulation authorizing such a demand. A few state laws prohibit private and public institutions from asking applicants about arrest records or about certain sealed criminal records; in other states an applicant may legally deny the existence of certain criminal records about himself or herself. The federal Fair Credit Reporting Act prohibits the use of credit reports for admissions or for internal investigations. Federal law and state laws prohibit intercepting telephone, modem, electronic mail, voice mail, digital, or fax communications without consent of at least one party to the conversation, unless an institution is monitoring for "the protection of [its] rights or property." Some states require the consent of both parties.

3. Policy Issues

One driving force for increased collection of information in higher education is the requirement by state and federal agencies for the reporting of increasing amounts of student data. Some of that data may be information the institution would not otherwise need for its purposes: ethnicity, for example. In some southern states, laws have recently been passed which require institutions to collect and use more, rather than less, personal student information.

From a purely management point of view, what information collection philosophy is practical and efficient? The institution's information management strategy will to some degree guide its data collection policy. Recent demands to cut costs in higher education may inspire more streamlined information management, prompting institutions to ask, "Do we really need to collect this information? Can we eliminate this questionnaire? Do we need to retain this information as long as we have in the past?" In the new interactive, online environment, administrators can search for ways to reduce or eliminate altogether some of their massive databases of personal information. Are there ways that the information can be retrieved later from other sources on an "as-needed" basis? Can a student be asked to provide an electronic source for locating information about him or her, rather than provide the information itself?

Other policy issues related to minimization include the automatic collection of data by systems, appropriate sources of information about students, collection of sensitive data, collection of data for emergencies, and how long data should be kept.

Transactional Data Collection

The nature of information technology is such that inexpensive, widespread collection of information is increasingly possible. As more of the day-to-day operations of the college and university are automated, an enormous amount of transactional information is automatically generated, quantitatively dwarfing the traditional structured databases of relatively static information. As students move around campus — physically and virtually — and interact with departments and service providers, they inevitably leave behind traces of their activities. A student who walks into a computer lab, logs onto the network, browses the bookstore's Web server, orders a text, and enters a credit card number for payment may have created a dozen distinct records in an equal number of databases and logs, each under the administrative control of a separate institutional unit.

Information may be gathered as a function of the commercial product or public domain software used by the institution, rather than as a deliberate institutional choice. Should information be collected and retained merely because the hardware or software permits it?

Appropriate Sources

Should the only source of information about students be the students themselves? Proponents of this view assert that if the student has not provided the information directly, its collection is inappropriate. However, in a campus context, as in many other social venues, this is overly simplistic. Certain elements of information that are not provided by student forms, questionnaires, or admissions materials alone may be mission-essential — for example, grades provided by faculty. There is also a genuine institutional need for the collection of information generated by some real-time student actions — logs of debits against a meal card are needed to ensure correct balances, and the number of printed pages generated by a student in a public computer lab is needed for billing purposes. Such logs are not strictly "provided" by the student but are created as the result of student action. Campus debate will likely center around the issue of balance in data collection.

Sensitivity of the Data

Another issue in the debate regarding the minimum data set that should be collected about students is the sensitivity of the data themselves. Some argue that the more sensitive the information, the less it should be collected. Others argue that institutional need, not sensitivity, should dictate the information collected.

Advocates of the first viewpoint have suggested that no information should be collected about the exercise of First Amendment rights — freedom of assembly, religion, speech. There are times, however, when institutions may

Examples of the Principle of Minimization

Lesser Application	**Greater Application**
☆ The institution places few restrictions on the type or amount of data collected, and uses multiple sources to collect information about students.	★ The institution collects only the information that is necessary to conduct specified institutional business. The more sensitive the data, the more closely the institution adheres to this practice.
☆ Data are monitored, tracked, and maintained based on defaults built into network software rather than conscious decisions about data collection.	★ To the greatest extent possible the source of information about students is students themselves.
☆ The institution collects a range of contingency data because of concerns about institutional liability, and also for potential use.	★ The institution has adopted the practice of having an associated disposal schedule for every element of personal information that is collected.

need to record religious affiliation. For example, students may need to provide religious affiliation in order to be assigned a chaplain. Also, student activity offices may unavoidably gather information about political affiliation from information about membership in campus clubs. External relation offices of colleges and universities may inadvertently gather information about both religious and political affiliation as a result of news clips, videos, or other media development activities.

Financial aid information has always been considered sensitive information, yet its collection is obviously essential. Other areas are decidedly more gray, however. For example, as part of the admissions process, should the institution collect arrest or conviction information? What kinds of data *are* appropriate to collect as part of the admissions process? The following practice illustrates the potential for increased collection of sensitive data by some institutions.

Under new admissions guidelines effective in 1998, one West Coast university admissions office plans to admit up to half an incoming class on "special circumstances" instead of considering race or sex. This will require applicants to submit information about difficult family situations, economic disadvantages (such as data about one's neighborhood, financial status, parents' educational level and layoffs), psychological difficulties, and so forth.

Collection of a student's Social Security number is another issue (see sidebar, page 19, for a more detailed discussion). As the example below illustrates, however, it is sometimes difficult for an institution to elect not to collect the Social Security number of students.

One admissions officer would like to move her university's student data systems away from using the Social Security number as the key to the database, supporting the notion of using a unique student ID number instead. However, the state in which the university is located requires the collection and reporting of information using the Social Security number as the common identifier — a major obstacle toward the university's changing this practice. Such conflicts are not uncommon.

Emergency Data

Should the institution collect information it would only need if an emergency arose, risking that the same information later may be used inappropriately? Two examples will help clarify this issue. Should a campus with a low crime rate collect and store information about all entry to locked buildings if the need for this information might only arise if a robbery or other crime occurs? Should the computer center collect and store enough information to be able to retrace the steps of any and all possible computer crimes?

In many ways, the safest philosophical approach regarding the principle of minimization is "no data, no dilemmas." However, from a practical perspective, some level of contingency or emergency information is an essential part of an institution's operation. The issue, again, is one of balancing privacy with the institution's need to protect itself against potential liability.

Archiving Issues

How long should data be kept and under what conditions? When are the purposes for which the information was collected deemed to no longer exist? Legal restrictions preventing disposal need to be factored into these decisions. In a networked environment, issues include the existence of system backups and archives and coordination of data disposal from all such file space, including e-mail messages.

4. Task Force Recommendations for Minimization

- Colleges and universities should gather all legally required student information and the minimal amount of additional information to accomplish a legitimate

ONLINE MONITORING AND TRACKING

Online monitoring and logging — watching and/or recording activity on a computer or network — is necessary to manage the flow of traffic over certain systems and to trace incidents of misuse of those systems. However, this practice can itself be misused in ways that result in a violation of the privacy of individuals.

On some machines there are public routines that, when monitored and analyzed over time, can provide a lot of information about the computing habits and practices of a targeted individual. One may be able to tell the hours during which the person uses particular machines, the amount of time spent doing electronic mail, or even the site at which the person is working. With enough time and persistence, such information may be combined with other publicly available information. If such data begin to be used to draw conclusions about the nature of an individual's use, the people with whom s/he communicates, the amount of time an individual accesses certain content, or the nature of their affiliations on the network, the privacy of that individual may be seriously violated.

It is also possible to write a basic program specifically to scan for particular user IDs or unique names, gathering information each and every time that user signs on to a service on the network. In some cases such sign-on information might be routinely gathered by system administrators, for the purpose of managing the system, without violating the privacy boundaries of individual users.

Commercial service providers have already begun to capture increasing amounts of information gathered from online monitoring and logging mechanisms, using such information to develop interest profiles of the individuals accessing different sites on the World Wide Web. They then distribute such information to others who may profit from contacting individuals with particular interests. Such treatment of personal information as a commodity to be traded and sold may be a violation of the privacy of individuals, especially if individuals are not aware of the collection of such data, which is often the case.

Higher education institutions will likely begin to increase the amount and kinds of logging and monitoring procedures they use within the next few years as they tighten security on their systems and try to manage and perhaps charge fees for the ever increasing use of key services. They will need to determine what online information is necessary to effectively do the job of managing the resources, and to consider when information collection goes beyond management needs and becomes an intrusion into individual privacy. They should consider standards and policies to guide the collection, storage, release, and use of any such logging or monitoring of information that can be tied directly to an individual. And they will also need to clarify their values regarding the sale and/or release of such information for secondary uses.

NUMERICAL IDENTIFIERS

Colleges and universities should be extremely cautious about collecting, using, and disclosing Social Security numbers (SSNs) of students. There are many reasons for this:

1. Stolen or misappropriated Social Security numbers lead to thousands of cases of "theft-of- identity" or "credit theft" each month, in addition to misuse by immigrants without documentation. If lists of persons' Social Security numbers are available, even within campus offices, employees can deliberately misuse them or inadvertently disclose them or make them accessible.
2. With someone else's SSN, a stranger can impersonate that person over the telephone, in person, or online and retrieve personal information about the individual. The Internal Revenue Service, for instance, will disclose detailed tax information to anyone who provides a Social Security number of an individual taxpayer. Many banks will also.
3. The number is not totally anonymous — strangers can tell in what state it was issued and approximately what year. If grades were to be posted by Social Security number, for instance (a practice not allowed under FERPA unless permission has been given by students), a class member may be able to identify out-of-state students or older, nontraditional students, or when arranged alphabetically by name, the actual person.
4. The incidents of inaccurate SSNs are so numerous that any record linkage based on the SSNs will be flawed.
5. Many individuals have a sincerely held religious or philosophical objection to being enumerated.
6. Long after a student has graduated, the Social Security number may show up on alumni mailing labels, thus publicly displaying the numbers and exposing alumni to the threat of fraudulent use.

All of these dangers arise when a college or university uses the SSN as the student ID number. Even though institutions may need to record Social Security numbers when students happen also to be employed by the institution or receive certain financial aid, the number should be collected at the time of these transactions with student consent. These uses should not be reasons for requiring SSNs of all students.

With today's database technology, the SSN and other personal identifiers are less necessary than in the past. A search for information on Winston Smith, for instance, when all you have is first name, last name, and home address, telephone number, or date of birth, is a reasonable search today. In the past such a search would have required more computing resources than were available at reasonable cost.

When Social Security numbers must be kept on students in a college or university system, the numbers can be encrypted so that they may be used for linkage of data files, as necessary, without revealing the actual digits of the SSNs. The resulting "record linkage number" will not permit a stranger to derive the SSN even if the linkage number becomes publicly known.[2]

Still another alternative, if a campus office must have a numerical identifier to make an accurate match of a record or to detect duplicates, is to ask a student for only the last four digits of his or her SSN. This maintains the anonymity and the confidentiality of the complete number, but will be adequate for establishing matches.

An institution can avoid most of the dangers of keeping Social Security numbers by establishing its own unique student identifying number. This will require extra effort by some systems administrators. One argument against this has been that most people don't remember a unique identifier, but many studies show that a sizable percentage of people provide incorrect Social Security numbers when asked — either in error or in order to maintain their privacy. Records have a higher accuracy rate when applicants are asked to consult a document, or use an electronic device when providing an ID number, rather than to rely on memory.

In any event, the Social Security number is not a reliable means for establishing personal identity because it has been so readily available and has been subject to widespread use by impostors. Administrators should rely, instead, on what has always been the best means of establishing personal identity — personal recognition. Where this is not practical or possible, there are adequate surrogate methods, like signature comparison, passwords, personal identifying numbers (PINs) known only to the individual, encryption for authentication, identity documents with photographs, fingerprint comparison (where there is no stigma or compulsion), and forms of biometrics.

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[2] See Eleanor Marx, "Encrypting Personal Identifiers," *HSR: HEALTH SERVICES RESEARCH* 29:2 (June 1994).

institutional purpose, avoiding gathering nonessential information simply because of the ease of collection or correlation in networked environments. Policy and practice should address means to ensure that collection of personally identifiable information has been appropriately authorized.

- Campuses should formulate a process for determining necessary log elements and log retention requirements, particularly for logs where the inclusion of personally identifiable information is unavoidable.

- For those log elements over which the institution exercises control (rather than those that are a default of the operating system or vendor-supplied software), designers should consider the principle of minimization and identify those elements that would really be necessary in the event of foreseeable contingencies. Those elements rather than the superset of all possible elements should be collected.

The Principle of Secondary Use

1. Definition

The premise of this principle is that when personal information is gathered from a student, it should be used only for the purpose for which it was collected (even within the same institution or office), or for a use compatible with that purpose, unless the individual has given additional consent. Thus the principle of secondary use goes hand in hand with the principles of notification, minimization, and nondisclosure and consent. Application of this principle means that an institution must articulate, when gathering personal data, precisely the purpose for which it is being gathered. In this process, an institution may discover that it has no clear purpose for requiring certain personal information.

2. Relevant Law

FERPA requires that any third party receiving personal information about a student may not permit another party to have access to it without written consent of the student. In addition, if a student waives his or her right of access to letters of recommendation, the recommendations may be used "solely for the purpose for which they were specifically intended." The intent of FERPA has consistently been that information collected for one purpose not be reused without explicit consent of the individual to whom the information refers or unless the reuse is a routine use, defined as a use which is compatible with the purpose for which the information was collected.

2. Policy Issues

The principle of secondary use is one of the most critical to be examined and understood as colleges and universities network information technologies within their campus communities. Once information is gathered and stored in a medium that facilitates its fast access, sorting, transport, and reuse, this information becomes much more accessible to the exercise of new options and opportunities. Data mining and sorting information in new ways to answer new questions or to form new hypotheses is not only possible, but may seem essential as institutions seek to better serve students or more aggressively market to new students. Matching one database with another enables looking at information in new ways, perhaps gleaning new information from these combinations. Care needs to be taken that any such manipulation of data does not disclose or make accessible individual, personally identifiable data.

The integrity of institutional communications and relationships with students is established at the first point of contact, that is, during the admissions process. When an institution asks a student for personal information as part of this process, it does so within an unequal power relationship — the implication is that the student must provide the information to be admitted to the institution, and that the information is for admissions purposes. Individuals release information during the admissions process that is of varying degrees of sensitivity to them. The institution cannot know the degree to which that information needs to be maintained as private or handled confidentially.

For the sake of speed or efficiency, institutions might engage in secondary use of student data without permission. But would the individual give permission if s/he knew how the data were being used? Uses that go beyond a reasonable notion of compatibility with the original purpose might include the sale of student mailing lists by an institution to generate a revenue stream — a practice that might tempt some campuses in times of fiscal constraint. Institutions must make decisions about how to handle such things as commercial requests

Examples of the Principle of Secondary Use

Lesser Application	Greater Application
☆ The institution does not specify potential secondary uses of data at the time information is being collected, that is, agreements with students are "implicit." ☆ The institution broadly interprets "routine" and "related" uses of information and thus frequently uses individual data for secondary purposes.	★ Use of student data is restricted to the purpose for which it was originally collected; that purpose is known and explicitly articulated at the time of collection. ★ Potential related uses of information are defined at the time of collection or require additional consent.

for student information for marketing purposes.

The law allows for, and most reasonable individuals would agree to, routine secondary uses that are compatible with the purposes for which the information was collected. But if the institution is planning to use personally identifiable student data for non-routine purposes, the secondary use principle requires that the student be so informed and that consent be obtained.

4. Task Force Recommendations for Secondary Use

◆ The institution should be explicit about the purpose for which information is gathered at the time of its collection, and identify the routine and compatible uses of the data it expects to employ in the course of official business.

◆ Secondary uses, not included in those stated as routine and compatible, should be avoided, but where such secondary uses are deemed significantly important to the institution, policy should consider how additional permissions will be obtained from affected students.

The Principle of Nondisclosure and Consent

1. Definition

Nondisclosure means the keeping of personally identifiable information about students from third parties, that is, parties external to the college or university. The release of such information *within* the institution is addressed in the discussions of the principles of need to know and secondary use.

2. Relevant Law

FERPA forbids institutions to disclose student information without written consent, except for certain specific parties for certain specific purposes and except for directory information, which may be disclosed unless the student objects. At least eight states restrict disclosure of medical information without consent. Some states restrict disclosure of information about patrons of tax-supported libraries; a few of these laws cover private libraries.

3. Policy Issues

Policy issues related to this principle revolve around consent strategies and data sensitivity, the nondisclosure of information created by use of information resources (such as library circulation records), and flexibility of campus information systems.

Consent Strategies and Data Sensitivity

The consent strategies an institution selects will depend on the sensitivity of the data as defined by the institution's policies. Such policies should address the relative degrees of sensitivity associated with student information. For example, items that might be considered very sensitive include medical records, financial information, sexual orientation, grades, and most aspects of family history. Examples of items that might be considered personal but less sensitive include permanent address and family size. Information that is less sensitive and whose public release would be relatively harmless might include such items as name, address, major, dates of attendance, and so forth. Data in the first two categories are usually defined by institutions as non-directory information, while data in the latter are usually considered directory information.[3]

Methods for obtaining consent for disclosure of student information include "opt-out" and "opt-in" approaches. With the "opt-out" method, commonly used for directory information, information is routinely released unless the student initiates an action to have the institution withhold the information. With the "opt-in" method, used for non-directory information, the institution withholds information unless the student has provided written consent for its release. Such consent might be required for each instance of disclosure or might be obtained on a "blanket" basis. In the former case, students might be required to knowingly consent in writing to each instance in which non-directory information is released. With the blanket consent method, students might be asked annually whether they agree to the release of non-directory information to third parties, and if they consent to such disclosure no further consent would be required for the institution to release such information. However, if blanket consent is used, FERPA requires that it must specify the party or class of parties to whom disclosure may be made (for example, potential employers) and state the purpose of the disclosure.

In an electronic networked environment, have the scope and concept of the principle of disclosure and consent changed? For example, though a student may not have objected to the public release of his or her directory information when it was to appear in a campus print directory, might the student feel differently if the institution's practice is to incorporate such information into a directory accessible on the Internet? What other kinds of information being captured about a student might s/he wish to exercise some control over? For example, the technology now makes it possible to create lists of those who belong to particular electronic discussion groups and to use that information for new purposes. While belonging to an electronic discussion group may be information a student doesn't mind another on campus knowing, s/he might object to such information being available beyond the campus. Institutions will need to develop policy with respect to whether they will publish directory information only in print or, if they plan to publish it electronically, whether it will be available only on a campus intranet or more widely distributed on the Internet, and whether consent strategies should be adjusted accordingly.

Flexible Policy, Procedures, and Systems

Given that there are likely broad individual differences in what types of personal information students feel are sensitive in a networked environment, how flexible do institutional policies, procedures, and systems need to be in enabling students to change categories in which the institution has placed a particular kind of information? For example, if disclosure of campus street or e-mail address on the Internet is unacceptable to an individual, should a means exist for him or her to place those elements in a more restricted disclosure category?

To what extent should campus systems be able to accommodate individual privacy desires? An institution's application of technology or systems design can hinder an individual's desire to exercise more control over release of information, but technology may also offer solutions that could *facilitate* a student's ability to choose. Advances in technology may make it possible for students not to have to make all-or-none decisions about the handling of their personal data. An institution's policy concerning how flexible it wants to be with respect to student choice will influence systems goals and design considerations and assignment of resources to accomplish those goals. Systems designed to provide flexibility and choice might be viewed as highly desirable and service oriented by prospective students, possibly justifying the additional costs of developing such systems. A cost/benefit analysis can help inform institutional strategy in addressing these issues.

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[3] Every institution must define by policy what it considers directory information and inform students of this policy. Directory information may include such student information as the student's name, address, telephone number, e-mail address, date and place of birth, major fields of study, participation in officially recognized activities and sports (including weight and height of athletic team members), photograph, dates of attendance, degrees and awards received, most recent educational institution attended, and other similar information that would not generally be considered an invasion of privacy or harmful to the student if disclosed.

Examples of the Principle of Nondisclosure and Consent

Lesser Application

- ☆ The institution uses an "opt-out" strategy for directory information and blanket consent strategy for more sensitive information in releasing such information to third parties.
- ☆ For such data as library circulation records, the institution complies with state laws regarding privacy, but may not extend privacy to network resources accessed.
- ☆ Default positions built into campus technology applications do not facilitate individual choice in controlling personal information.

Greater Application

- ★ Whenever possible, the institution requires a signed consent form for individual instances of release of student information to third parties, and discourages such disclosures.
- ★ The institution develops a robust set of policies to protect confidentiality of library records and the use of electronic information resources, including use of information on publicly accessible workstations.
- ★ Campus systems are designed when possible to accommodate individual requests for withholding selective information from different communities.

Disclosure of Information Created by Use of Information Resources

There are many similarities between library records and the student records generated by the activities of student services offices (registration, admission, financial aid). By the same token, is information about which Web sites a student accesses and what information the student downloads from those sites similar to information about what library books a student checks out?

The American Library Association advises that all libraries formally adopt a policy that specifically recognizes the confidentiality of its circulation records and other records identifying the names of library users. The definition of circulation record varies from strict interpretation of items checked out through an institution's library circulation system to any information about the use of any library information resources in any format.

Of more complexity is the relationship of current laws and practices to the use of electronic resources at workstations made available at the institution. Is it an invasion of a student's privacy, for example, for a reference librarian to glance at the screen of a workstation as s/he walks by and/or to stop to suggest more effective search techniques? Should the records of what a student has accessed on the World Wide Web enjoy the same privacy protection as library circulation records?

4. Task Force Recommendations for Nondisclosure and Consent

◆ During policy development, institutions should consider defining categories of information as to their sensitivity, determining under which strata elements of information fall, and establishing congruent consent/disclosure mechanisms for each type of information.

◆ In developing policy with regard to data categorization, institutions should consider the means for students to change the categorization of an element and to specify that it be treated as more sensitive than generic policy would normally dictate. The use of technology to facilitate individual choice in this area should be considered.

◆ Consent should be specific with regard to the manner and type of disclosure, as well as the identity of the recipients and their intended use of the information. The means by which students may revoke consent should be addressed during the policy development process.

◆ The institution should ensure that students fully understand what their rights are with regard to requesting that information not be disclosed.

The Principle of Need to Know

1. Definition

This principle is based on the premise that an individual within the institution seeking access to personally identifiable student information is granted such access if and only if s/he has a need to know the information as part of an official and legitimate educational interest and in conformity with disclosure agreements. Under this principle, access to student information is based on normal job duties and the purpose and scope of the proposed use of the information.

2. Relevant Law

FERPA permits disclosure of student records within an institution to officials who have been determined by the institution "to have a legitimate educational interest."[4] State laws may add more obligations for confidentiality. Some state freedom-of-information laws require state agencies, including state universities, to release certain documents, but this release is subject to the confidentiality provisions of federal law.

3. Policy Issues

Colleges and universities must establish their own criteria, according to their own procedures and requirements, for determining when campus officials have a legitimate educational interest in a student's education records. To this end, institutions usually establish a policy that specifies who should be given access to student records and for what purpose. Such a policy generally recognizes two types of access: (1) access that is a normal expectation for the routine performance of a given job, and (2) access that is required for special circumstances.

Most such policies also address the data "stewardship" function for student information. The responsibilities of the data steward generally include ensuring that access to the information is controlled by and consistent with both the needs of the institution and the privacy needs of individual students.

With respect to job-related access, an institution's policy generally reflects its unique culture and environment. It is usually clear who needs access to student records to perform their jobs — faculty members, student services personnel, financial aid personnel, bursar's office personnel, and so forth. In the case of access requested for special circumstances, evaluating the purpose and scope of the proposed use of information can help the data steward solidify whether there is sufficient need to allow access to particular student records.

In a networked environment, institutions increasingly encounter situations that are less well defined and where effective "control" may be difficult to enforce. For example, the counseling office may think it appropriate to access computer or network access logs for students who have been identified as being at risk of failing, based on their grades. In this case, who is responsible for determining whether access can be granted to log information that is not part of the structured data in the office of the data steward? On what basis is such a determination made? What happens if the system manager and/or data steward disagree with the counseling office's need to access this information? Access to information in structured databases may also become more of an issue. As technology makes access to such databases more readily available, battles on campus over who has legitimate educational interest will proliferate.

Institutions need to consider the age of their data access policies and the potential need to reevaluate them in light of a ubiquitous networked information environment. One way to approach this challenge is to create a process that brings together a wide range of campus constituents to systematically reexamine these policies within the framework of institutional discussion of values of privacy and access. Undertaking such a process is discussed in greater detail later (see pages 34-37).

How the institution defines the boundaries of legitimate educational interest will depend on many factors, but it will be increasingly important to articulate such policy very carefully. As institutions continue to move toward the goal of having more information available for planning and decision-making, how can personally identifiable student information be protected against access that does not meet the institution's need-to-know definition?

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[4] The Department of Education has created a model notification of rights under FERPA for postsecondary institutions (in FERPA Final Rule, *Federal Register*, November 21, 1996) that includes the following statement: "A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility." For more detail, see definitions for "Legitimate Educational Interest" and "School Official" in Appendix B, pages 40-41.

MISAPPLICATIONS OF PRIVACY

There are often misconceptions about privacy and its protection. Administrators should realize that privacy traditionally extends not to *all* information about an individual; rather the context determines what is considered private under the law. Privacy protection generally does not extend to persons who have died.

Privacy is a shield, not a sword. It ought not be a means for covering up wrongdoing or perpetuating a fraud. Often, among employers, there is a "conspiracy of silence," in which a representative of the institution is either untruthful, misleading, or noncommittal when asked about the work performance of a recently departed employee, including a student employed by the institution. This simply passes on an undesirable employee to another unknowing employer.

Such silence, which is sometimes blamed on "privacy," may actually stem from a fear of a later lawsuit based on defamation. But employers should realize that they would not lose such a lawsuit if they can defend the truth of what they have said or if it is clearly an opinion. An observation that "I would not hire the person again" or that "We would not recommend the person," whether written or verbal, raises little if any risk of later retaliation.

There have been cases in higher education of present or former students using the protection of the Family EducationalRights and Privacy Act to perpetrate a fraud. For instance, by asking a college or university not to release "directory information" about him, a student may lie to a prospective employer and say that he has a degree from the institution when he does not. The student expects that the federal law will render the institution powerless to set the record straight.

When asked whether the employment applicant received a degree, the campus official has some options, under the law:

(1) Answer by saying, "We have no information that we are permitted to disclose per student request."

(2) Suggest that the inquirer get the consent of the employment applicant to release his/her information.

So long as the official is not disclosing information from student records, s/he is on the safe side of the law.

Similarly, FERPA may make it difficult or impossible for different institutions to exchange information once they have been alerted to the possibilities of fraud perpetrated by a student or former student (for instance, a student who was admitted to a graduate school on the East Coast based on a fraudulent undergraduate record discovered at a West Coast institution). Many people believe that the only solution is an amendment to the federal law, permitting certain disclosures in order to correct erroneous assertions or to prevent the continuation of a fraud or deceit.

One public university registrar notes, "As institutions move toward networked information systems, the role of the student data steward becomes very complex and time-consuming. Perhaps the time is at hand to recognize the full-time profession of a student records data steward responsible for working with technicians in the development of systems which comply with policy, legal, and ethical standards; handling authorizations for system access, requests for student information, legal summons and subpoenas, and requests to withhold or release information for individual students; investigating complaints about inappropriate access or release of information or breaches of the security of the system itself; disposing of cases of outright fraud; and providing training in the legal and ethical handling of student data. To expect that all of these bases will be appropriately and consistently covered by individuals with other student service or technical responsibilities may be wishful thinking." Again, such choices about information practices will necessarily include a cost/benefit analysis.

Technology and Control

Implementations of technology — for example, a network-based information system — must incorporate the meaningful involvement of the relevant data stewards to guarantee their ability to control information

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dissemination in accordance with the institution's defined need-to-know criteria. For example, personally identifiable student information may be accessible to someone classified as a "school official" without the student's prior consent. However, the definition of a school official may be vague, ambiguous, or not universally understood. It may permit inclusion of individuals such as affiliated legal counsel and contracted consultants. For these individuals, technology permits necessary and easy access to information while reducing institutional control of the dissemination of the information. While persons granted official access to protected information have an obligation equal to the data steward's to maintain privacy and confidentiality, they may not understand their responsibilities fully nor the implications of emerging technologies.

In addition to finding that technology may contribute to the complexity of exercising their stewardship responsibilities, data stewards may also find that some commercial information systems have limited mechanisms for providing access restrictions. Some institutions integrate student information in other information databases or displays. This commingling or merging of information presents challenges with regard to the principle of need to know in that certain personal information will require a higher level of access privilege. For example, a faculty advisor may have a legitimate need to access a student's grade information, but if the student's information is displayed with other information about the student to which the faculty member is not entitled access, this could violate the student's privacy.

In discharge of its stewardship responsibilities, and in design of its information systems, an institution needs to ensure that individuals be given access only to records they need, not to all information concerning a student or to the same information about all students, as in the incident below. This extends to routine, job-related access, as well as to special requests or circumstances necessitating access to student information.

A financial aid officer in a large midwestern university was pleased with the plan to reformat financial aid information and make it available to authorized individuals in the student's department. She believed this would make it easier for department personnel to discuss financial aid information with students directly and more conveniently. However, she found that the new application allowed all authorized personnel in all departments to access the financial aid information of all students. Insufficient input from this student services officer into the application development process resulted in greatly expanded potential access by many different individuals to student data and increased potential for privacy violations.

Examples of the Principle of Need to Know

Lesser Application ⟷ **Greater Application**

Lesser Application

- ☆ The institution allows access to student information based on the legal constraints of FERPA.
- ☆ Student information is available through technology applications that have been minimally analyzed for compliance with the institution's privacy policies and procedures.

Greater Application

- ★ The institution has developed and published a data access policy that addresses legitimate educational interest and access responsibilities in a networked environment.
- ★ While appropriate staff members in each office have access to student information, the information is not readily transferred across different offices.
- ★ A custodial panel reviews and decides questions about legitimate educational purpose.

The incident also illustrates the importance of involving data stewards in the design and implementation of student applications to protect privacy.

4. Task Force Recommendations for Need to Know

◆ A clearly defined institutional policy should be adopted regarding access to student information, taking into consideration such criteria as job duties, purpose and scope of proposed use, and compliance with privacy regulations.

◆ Implementations of new technology applications should consider whether the system design supports institutional privacy policies and procedures, especially the design of display and report formats to limit the amount of information displayed on a screen.

◆ Technology implementations should include the active involvement of not only information technologists but also data stewards to ensure system design that supports need-to-know policy decisions.

The Principle of Data Accuracy, Inspection, and Review

1. Definition

The premise of the principle of data accuracy, inspection, and review is that information about students collected and maintained by a college or university must be accurate, and that students have the right to examine information about themselves and to request changes they feel should be made to their education records.[5] Without a sound approach to inspection and review, the institution will be hampered in meeting its requirement to correct information that is incorrect because input from students about the accuracy of their data will be lacking. A person cannot knowingly and meaningfully consent to the release of information in a record if s/he doesn't know what information is in the record.

2. Relevant Law

FERPA requires each institution (1) to permit a student "the right to inspect and review" education records; (2) to have an opportunity to challenge the accuracy of their records; and (3) as necessary, to include with the record a statement of dispute. Certain information is not subject to review. For example, substantive decisions such as grades or evaluations in lieu of grades are generally not subject to FERPA's amendment process. Laws in about twenty states permit a person to inspect his or her medical records. Further, institutions have an obligation to inform students each year of their rights under FERPA, which includes the right to inspect and review education records.

3. Policy Issues

The institution's responsibility with respect to this fair information principle is to define an effective request process and to make known to students the types of data that are being collected and maintained and the various offices responsible for the records to facilitate their request for review of their data. Within the context of FERPA, when a student asks to see his or her records, the institution must make the information available, unless there is a compelling and legally justifiable reason for non-release, and explain the information to the student during the inspection/review process. Methods for properly authenticating the identity of the student making the request should be in place prior to information release.

Two issues associated with this principle in a networked environment relate to responsibility for ensuring accuracy of student data in distributed databases, and the extent to which the right of inspection and review applies to data captured through transactions and automatic logging, including the feasibility and cost implications of such review.

Data Accuracy in a Distributed Environment

Technology has enabled student information to be replicated in a number of different databases, under the control of a number of different organizations within the institution. Since students have a vested interest in the accuracy of their own information, as well as the right to inspect and review information stored about them, there is a certain logic in vesting primary responsibility for error detection with the student. However, the issue is more complex in a distributed environment. For while a student may be able to communicate to the steward of his or her information that a data element (for example, local address) is incorrect, it is unreasonable to expect the student to be cognizant of every office that may have replicated that information and to contact each one. The issue of how to synchronize or maintain currency of disparate databases is an institutional responsibility that must be addressed. Network technologies and network-based student systems can actually facilitate a student's access to his or her own data, and thus make it much easier for a student to inspect and review that data to be sure of its accuracy.

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[5] FERPA defines education records as those records, files, documents, and other materials which (1) contain information directly related to a student, and (2) are maintained by an educational agency or institution or a person acting for such agency or institution. (See the expanded definition of "Education Records" in Appendix B, page 40, for a list of records which are not considered education records under FERPA.)

Review of Transactional Data

There are items of information now being collected about students that are not a part of the structured databases under the jurisdiction of student services and academic discipline officers — primarily data captured as a function of electronic transactions generated by student activity such as accessing a dining room or signing on to computer systems. To what extent is it possible to make such data available for student inspection and review? May a student request a modification to an event log, and how should such a request be handled? There may be costs associated with complying with student requests to inspect and review such records that the institution will need to address. Policies and procedures will be needed concerning these types of records, to define the records that can be made available and the related request and change process.

4. Task Force Recommendations for Data Accuracy, Inspection, and Review

◆ Students are responsible for providing accurate information about themselves for entry into college or university databases. However, institutions need to consider how distributed databases can be synchronized with the master data source so that students do not bear the responsibility for accuracy of their data in multiple databases. Institutions should also consider how such databases will be administered to increase consistency and employ good data management practices.

Examples of the Principle of Data Accuracy, Inspection, and Review

Lesser Application ⟷ **Greater Application**

- ☆ The institution responds once data inaccuracy is reported but places responsibility on the student for the accuracy of his or her data. Information is provided once by the source (student) and upon entry it is assumed to be valid unless the student specifies otherwise.
- ☆ There is no policy or set of guidelines in place to address data administration issues to ensure good data management practices.
- ☆ The institution does not systematically inform students of their right to inspect transational data for accuracy or have a process by which they can do this.
- ☆ The institution does not address the problem of data synchronization in a distributed environment.

- ★ The institution acknowledges its shared responsibility for data accuracy and spells out in policies or guidelines individual and institutional rights and responsibilities.
- ★ Data administration policy and procedures have been created to address the issue of data accuracy in a distributed computing environment.
- ★ The institution reveals all information being collected and facilitates student review of records, providing a convenient way to request a review. This is the case for all information, regardless of its sensitivity or how it is being collected.
- ★ The institution employs routine validity checks, and periodically asks students to review critical data.

- Institutions should periodically ask students to review critical data for accuracy, and should consider the use of secure technology to allow students direct access to their own data to facilitate inspection and review.

- Institutional policy and procedures should address the issues of inspection and review of transactional data, defining records that can be made available and the related request process.

Principle of Information Security, Integrity, and Accountability

1. Definition

The principle of information security, integrity, and accountability is composed of three related elements. *Security*, in terms of information technology, is the protection of user files and system resources from loss, damage, inappropriate access, and unauthorized disclosure or use of sensitive or private information. *Integrity* is reasonable assurance that data, once entered, will not be subject to unauthorized modification by intentional or unintentional means, and that data will remain unaltered during transmission between sending and receiving systems. *Accountability* in this context is the ability to explain security-related events and to link them to the originator. The cost of security, integrity, and accountability measures should be commensurate with the overall value of the information resource, and assessment of the overall risk posed by the existing or planned system or network implementation to the institution, to other sites, and to individual users' information.

2. Relevant Law

FERPA requires each institution not to disclose student information without written consent, except for certain specific uses and except for directory information, which may be disclosed unless the student objects. FERPA also requires each institution to maintain an audit trail within each student record listing all outsiders who have had access to the record and to keep that audit trail confidential, unless the disclosure is with consent or is limited to directory information. State computer crime laws provide punishment for the use of a computer in a crime and for unauthorized access to a computer system. The federal computer crime laws provide punishment for trafficking in stolen passwords and unauthorized access to a system across state lines. Fair information practice laws in several states require security of personal information in state institutions and, in some cases, the designation of a data security officer in each institution.

3. Policy Issues

Policy issues related to this principle arise in several areas, including appropriate levels of security for information of varying sensitivity; institutional policy for information access and acceptable use of electronic resources; and limitations and capabilities of the technologies employed.

Data and System Classification

Before institutions can begin to define adequate and reasonable security for their environments, there must be a shared understanding of which information is, in fact, sensitive and the degree of sensitivity. While legal and policy definitions may exist in the case of records in central student information systems or for research grants that contain explicit security provisions, the expansion of access to information generated by student activity or data in system logs introduces issues that may not yet have been considered. For example, how sensitive is student electronic mail? Is its protection to be a high priority or is it to be assumed and made known to students that unencrypted electronic mail is not private? How sensitive is a file about a student that is kept online by a faculty advisor? What security measures are appropriate for information the institution might require in an online application form (for example, family and background information, credit card number)? Is an individual's picture more sensitive when stored or disseminated electronically?

The rapid expansion in the number and character of items that may be shared electronically should evoke policy discussion on appropriate levels of security and sensitivity classifications for student information outside structured databases. The commonly used guideline has been: "If the information is personally identifiable, it must be protected." However, how the data will be protected and the measures that are reasonable for the assessed risks are institutional decisions that must be considered in light of the network environment and institutional culture. Moreover, assessment should be made as to which systems are truly critical in the distributed environment (for example, ones whose loss or compromise would unduly jeopardize the security or integrity of private information or of other systems where private information is maintained).

As colleges and universities begin to transmit more and more information of a private nature to and about their students, the need to extend to academic networks the types of security that used to be associated primarily with administrative mainframe systems must be evaluated to avoid incidents such as the following.

> The online student system at one eastern university was accessed for over two years by someone who knew how to work around newly implemented procedures. Sixty-eight grades for seven students were changed. Once the unauthorized access was detected, two employees were fired and three degrees were rescinded.

Responsible Use Policies

An institution must consider whether and how to define what it considers acceptable use of its information resources and how potential breaches in security or information privacy will be handled. Without a formal policy to define security rules, roles, and responsibilities, it may prove difficult to hold users accountable. Rules that are unwritten may also prove unenforceable.

Technical Capabilities and Limitations

In a nutshell, the primary security issue surrounding electronic transmission of private student information is: can information be ensured of privacy protection if the network itself is not at least reasonably secure? Having determined and defined appropriate uses (and abuses) of information and categories of sensitivity for both database records and data captured from tracking systems, how can the data be protected? Are there areas where limitations in existing security technology make a particular implementation unwise? Who will decide? In instances where technical security measures may be unavailable or inadequate, how will the institution gather user input on whether the value of access is more important than the risk of a privacy violation? How can individual choice to receive or not receive personal information electronically be accommodated?

Fundamental technical issues for heterogeneous networks of the type found in most institutions include authentication and authorization, communications security, physical security, and logging.

Authentication and Authorization. What technical means can and should be employed to reliably validate the identity of network users (authentication) and to determine their access (authorization) levels? How can network access be controlled such that unauthenticated (and thus untraceable) access is eliminated, or services that can be obtained anonymously are limited to only those that can do little harm? How can individuals ensure that the electronic correspondence they receive is actually from the purported sender? How can an application determine it is connecting to the correct server and not to a system that has assumed its network identity? There are emerging cryptographic solutions in these areas (see page 11), but who will be responsible for planning their widespread introduction and use, and in what timeframe?

Communications Security. How can institutions safeguard private information being transmitted to or through traditionally less-controlled academic networks where students work? In particular, how can this be done in an era in which it is very easy for even amateur system crackers to "sniff" or read data from many unencrypted communications links? How can the institution ensure that applications developed in the distributed environment take into account communications security? How and where can technologies such as encryption be employed effectively, and how will institutional standards in this area be determined? Who is responsible for defining solutions to protect the privacy and integrity of student information on an institution-wide basis? What types of data integrity and checksumming measures are appropriate for information at the various sensitivity levels? Without a carefully planned strategy that facilitates protection of information as it is transmitted through the network, privacy may not be possible in any meaningful sense.

Physical Security. How will physical access to key network components, whose compromise could justify the privacy of attached networks, be controlled? If physical access can be gained to a major component of the network, or even to a PC where critical information is

Examples of the Principle of Information Security, Integrity, and Accountability

Lesser Application ⟷ **Greater Application**

Lesser Application

- ☆ The network security function is not coordinated institution-wide, nor are information security concerns integrated into planning processes; security is left largely to individual system administrators.
- ☆ Automated error checking, audit trails, and purge criteria are not widely implemented.
- ☆ Formal risk assessment methodologies, vulnerability testing, security training, disaster recovery, and incident response strategies and responsibilities are not defined, or are ad hoc in nature.

Greater Application

- ★ The institution plans for and implements policy and processes to address the more critical physical and procedural security issues surrounding the dissemination of student information via networks.
- ★ Responsibilities for security are formally defined; security and integrity issues are integral and mandatory parts of the application design process at all levels.
- ★ Formal risk assessment methodologies, vulnerability testing, disaster recovery, incident response strategies, and responsibilities are defined.
- ★ The institution employs a confirmation process (such as digital signatures or encryption) that ensures student record information cannot be changed without detection while traveling across campus networks.
- ★ Automated error checking, checksums, audit trails, and purge criteria in some combination are routinely used.
- ★ Technical guidelines and training "how to's" related to security issues are provided to individual system administrators and to users.
- ★ Information management practices ensure that only authorized and authenticated staff members perform updates, and information is released only to authorized and authenticated requesters.

downloaded and stored — and there are no compensating security software products in place — private information can be read, modified, removed, or retransmitted. Policies should address the susceptibility to theft of components where sensitive data are kept.

Logging. A final technical network security issue is how much information about network transactions will actually be maintained. Because network intrusion detection is in its infancy, security events are seldom reported in real time. Thus, there is an increasing need for logs sufficient to reconstruct events weeks or even months after the fact. However, many of the systems that students commonly use may not yet employ an adequate level of logging to permit detailed reconstruction. Moreover, the logs themselves, if not properly managed, used, and secured may become a target or a potential privacy concern. How will accesses be logged and how much is appropriate and necessary to log (in keeping with the principle of minimization)?

4. Task Force Recommendations for Information Security, Integrity, and Accountability

◆ The institution should address the development of policies, processes, and procedures that deal with the more critical physical and procedural security issues surrounding the widespread dissemination of student information via networks.

◆ The institution should take reasonable steps to protect the integrity of student records by ensuring that they are not unduly subject to inadvertent or intentional modification or deletion when collected, stored, manipulated, displayed, or disseminated using the institution's electronic information resources.

◆ Responsibilities for security should be formally defined; security and integrity issues should be considered an integral and mandatory part of the application design process at all levels; and individual system administrators and users should be provided technical guidelines and training related to security issues.

◆ Care should be taken in setting up systems to avoid inappropriate — but in many cases built-in — information access, such as world-readable log files or Web caches not cleared from user to user.

◆ Institutions should articulate procedures for how potential breaches in security or privacy will be handled.

The Principle of Education

1. Definition

The premise of this principle is that colleges and universities have a basic responsibility to educate not only their students but faculty, staff, and administrators about the privacy rights of students and potential implications of use and misuse of personal information, especially in a networked environment. Students may not be familiar with these issues upon enrollment, and such understanding is necessary before they can give their informed consent for information use. This definition of "education" extends beyond simple notification and informed consent and includes information on the aspects of technology that may cause privacy concerns.

2. Relevant Law

FERPA requires each institution to inform students of their rights of privacy and access under the law. Each institution is also required to give public notice of the categories it has designated as directory information and therefore releasable unless the student objects.

3. Policy Issues

Administrators who handle arbitration of computer abuse incidents on college campuses have long recognized that more harm is done through ignorance about information technology than through a motivation to harm. Education, then, becomes a practical matter for the institution, if not an ethical matter. Such education regarding the privacy of student information in a networked environment means systematic instruction by the college or university to enable students to understand fully their privacy rights and the potential implications of uses and misuses of information.

There is a vast continuum between the legal requirement to inform students of what constitutes directory information and systematic instruction in privacy issues and technological impacts. If there were no legal obligations, what would the institution do? Colleges and universities will need to adopt an education policy somewhere along this continuum, based upon their culture, values, and commitment to an ethical approach.

Assessment of Educational Needs

Central to developing an educational program is assessing the current state of awareness by the student body and administration regarding privacy issues. Is there widespread awareness of the possible ramifications of providing increased electronic access to personal student information and an understanding that implicit tradeoffs exist between convenience and privacy? Is there an awareness that unencrypted electronic mail is not secure, or that e-mail may not be a privacy-protected entity on a given campus or in a given state? Are students knowledgeable enough about the World Wide Web to understand how the data and images posted there might be disseminated and subsequently used?

To what degree does the college or university wish to be responsible for helping its students become informed consumers of information technology, fully cognizant of both risks and benefits? How proactive does the institution want to be and what format will it use to educate students with regard to privacy issues, including existing discipline and enforcement procedures, in the use of electronic information resources? Institutions will need to answer these questions as they formulate privacy education programs, especially to think about whether the tone of their program will be "educate to inform" versus "educate to warn."

Timing

When and how to reach students is an important issue in the formulation of an educational program, and the answers are probably unique to each campus. Many institutions provide information about computing during freshmen orientation, along with a deluge of other information ranging from parking to health services. This may be too much information to expect any individual to assimilate at one time. However, students usually want access to the Web and electronic mail services immediately upon arriving on campus, so it may be unwise to delay instruction about these services. How much information do students need immediately, and what information can be disseminated after freshmen orientation?

Dissemination Vehicles

Students may sign a statement during freshmen orientation that they agree to abide by the campus policy for ethical use of electronic resources. Receipt of a computing account may be contingent on this signing. If information isn't provided during freshmen orientation, what student communication vehicles (student government, student newspaper, campus radio station, institutional Web pages) are the most effective dissemination tools? What are the best mechanisms for reaching students within a particular institutional context? By what means do students receive information about the general policies of the institution and their responsibilities in networked environments, and how effective are these vehicles? For example, if an institution offers students an opportunity to opt out of getting their photo digitized, this option would best be explained to them on or near the time of the photo session. This form of education is in contrast to a sign posted in the back of the room which makes no mention of their choices, options, and access concerning such digitized photos.

Educating Faculty and Staff

Beyond education of the students, there remains an institution-wide process of raising the community's sensitivity to privacy, and to their individual responsibilities referred to by FERPA. When privacy education is mentioned, most people typically think about instructing students in these matters. But there is another population on campus that will likely need education on privacy issues as well — information handlers (including faculty) and technologists. Some unit or individual on campus should take responsibility for periodically providing professional development opportunities for data

Examples of the Principle of Education

Lesser Application ⟷ **Greater Application**

☆. The institution provides required notification about students' right to privacy in compliance with FERPA, probably through the student handbook or campus newspaper, but does not educate students further.

☆ The institution does not systematically attempt to educate faculty, staff, or administrators in legal or ethical privacy considerations.

★ The institution has developed an institutional process and delivers both a formal and informal instructional program that educates the entire community (not just students) about policies on privacy and the potential uses and abuses of technology in this regard.

★ The institution assumes the responsibility for assessing the effectiveness of this process/program.

handlers and technologists. While many professional organizations provide training/seminars/conferences on privacy issues, the campus has a role to play here, also.

4. Task Force Recommendations for Education

◆ Institutions should address the most effective methods in their environments to provide systematic instruction to students regarding their privacy rights and the potential implications of uses and misuses of information. Instruction should include information about aspects of the technology that may result in these uses and misuses, beyond simple notification and informed consent.

◆ The institution should ensure that faculty, staff, and administrators are also educated about the legal, ethical, and policy issues of students' right to privacy.

V. Building Policy in a Networked Information Environment

Our task force recommends that each college and university engage in a process to clarify the values that generally reflect its unique culture, mission, and environment (small or large, public or private, urban or rural), and to develop policy congruent with those values that addresses privacy issues in a networked information environment. How might a campus undertake such a process? Three key success factors are that the process be open, that it have executive-level support, and that the discussions be based on real incidents.

An Open Process

It is important that the process of building policy about handling information in a networked environment be institution-wide and open, that is, involve many different campus constituents — faculty, staff, students, administrators. Both technologists and non-technologists should participate in these discussions to fully explore the implications of a networked information environment, identify relevant laws, clarify values, and weigh potential tradeoffs.

Several colleges and universities have developed model policy-building processes (primarily for developing policies addressing broader networked information resources issues, including privacy). Four campus experiences are described below.

Cornell University

Cornell University relies on fundamental principles and mission when developing any policy. Both computer use and abuse policies have been created to conform to the University's existing understanding of issues and to reflect Cornell's culture. The best way to ensure this outcome is to include community members in its creation. At Cornell this process is multi-stepped.

The process used to develop Cornell's electronic resources policy began with the Vice President of Information Technologies asking the Associate Vice President for Human Resources, the University Counsel's Office, the Judicial Administrator, and several representatives from the Information Technologies organization to join him in discussion about responsible use of electronic communications. These discussions, which occurred over the course of a year, took into consideration existing relevant University policies, codes, guidelines, and practices, and resulted in the drafting of a policy. This draft policy was then reviewed by faculty members, staff, and students prior to its implementation. The Dean's Council, the Faculty Committee of Representatives, and the University Assemblies (representing the students, faculty, and staff) all discussed and had input into the revisions of the draft policy. After such wide campus involvement, the ratification process was smooth, paving the way for implementation and education.

Implementation and education are as important as the policy creation, especially since there is a computer use culture that often runs counter to institutional policies and state and federal laws. At Cornell, all new students attend a 50-minute education program to learn about and discuss electronic communications and computer resources on campus. Part of this course focuses on responsible use issues. In addition, the office of Information Technologies provides educational programs to the colleges, including the deans, directors, and department heads as well as system administrators and student groups. The programs provided at Cornell that were the most well attended in 1996 focused on the Communications Decency Act and included discussions on censorship, freedom of expression, privacy, and ethical use of computer resources. For more information, contact Marjorie Hodges at mwh2@cornell.edu or see http://WWW.UNIVCO.CORNELL.EDU/policy/RU.html

University of Maryland at College Park

The University of Maryland at College Park is the flagship campus of the University of Maryland System. The campus administration does not adhere to a single policy-making process but offers a variety of avenues by which policy can be developed. Decision-making is notably decentralized at an institution that includes thirteen colleges and schools and three administrative deans who manage programs in a cooperative administrative structure.

The College Park Senate provides an opportunity for faculty, staff, students, and administrators to participate in campus governance. While, to date, the Senate's role in the development of technology policy has been minimal, it has the potential for providing the forum necessary for open and inclusive deliberations. A data policy committee has also been established to develop guidelines and policies governing the development and management of campuswide data and databases. Some policies are developed from grass-roots efforts; the *Guidelines on the Acceptable Use of Computing Resources* resulted from the work of a group of faculty, administrators, and staff and the review of legal counsel, cabinet, and Dean's Council.

Project NEThics, a new initiative of Academic Information Technology Services, provides a model for open community discussion and examination of issues. The Project's mission is to ensure responsible use of University computing resources through policy enforcement and user education designed to inform community members about the legal and ethical implications of computer use. Project NEThics staff play a key role in pulling together policy-makers and users from across the campus to stimulate dialogue in this area. Given the University's ambiguous policy structure and a persistent campus culture that favors decentralized decision-making and authority, it is expected that Project NEThics' efforts to coordinate policy development will be vital to the establishment of technology policy that maximizes input, ensures the support of upper-level administration, and is based upon real incidents. For more information about this model, contact Rodney Petersen at rodney_j_petersen@umail.umd.edu or see http://www.inform.umd.edu:8080/CompRes/PolicyAndEthics/aug/

University of Michigan

The University of Michigan is also a highly decentralized environment. There are three campuses within the University system. The largest campus, in Ann Arbor, has seventeen schools and colleges, each with its own administrative decision-making processes. The University has a large, diverse community of approximately 80,000 faculty, staff, and students.

Information technology policy has been made through a combination of efforts, mostly committee centered. Committees, representing faculty, staff, and students, have been assembled to gather information, discuss, and formulate recommended policy on such issues as responsible use of technology, privacy of electronic mail, definition and handling of electronic records, handling of personal information, and data administration. All policy recommendations are also reviewed by legal counsel, and most also by the campus Civil Liberties Board, Faculty Senate, Council of Deans, and other relevant groups. Even with such committee involvement, however, achieving adequate input and response from the campus community is a significant challenge.

A model which has been successfully used at the University of Michigan, called the "Think About It Campaign," has provided a mechanism for expanding the debate of important issues and increasing both input to the formulation of policy and commitment to the established policies. In this model, faculty, staff, and student volunteers are recruited to facilitate, in pairs, small and large group discussions of ethical issues related to technology use on campus. The volunteers are trained in group facilitation techniques and given an opportunity to debate the issues themselves prior to being assigned a group. Real vignettes, illustrating technology-related ethical dilemmas such as conflicts between ease of use and security, between freedom of speech and freedom from harassment, and between censorship of content and unlimited access, are provided as discussion starters. The key component of this model is that discussion is the goal in and of itself, not necessarily finding the "right" answer. In this way, participants are made comfortable sharing their points of view and the community view is allowed to emerge. For more information about this model, contact Virginia Rezmierski at ver@umich.edu or see http://www.cause.org/information-resources/ir-library/text/cem9233.txt

University of North Carolina-Chapel Hill

The University of North Carolina-Chapel Hill, another large and complex community, has successfully used an open process to develop a policy framework for networked information. The Information Resources Coordinating Council (IRCC) at the University of North Carolina was created by the chief financial officer to coordinate the management of pan-University digital information stores and technologies distributed across organizational boundaries. The committee reviewed issues and principles which had previously been developed by a faculty-based advisory committee. They developed a policy framework to guide ongoing development of information policy. The council of library and technology leaders then initiated a series of discussions with representative focus groups, administrative units, and governance councils. Participants in these discussions received advance copies of the draft policy along with descriptions of several information-related campus incidents. These incidents/cases served to highlight implications and tradeoffs inherent in the policy framework and to underscore the need for such a document. Finally, after these extensive open campus discussions, the Chancellor's Administrative Council endorsed the policy framework for the campus.

Implementation of this policy framework is also being done through an open, participatory process. The IRCC has commissioned several working groups to begin the implementation process. One group is focused on the scope, integrity, and presentation of "official" institutional data, another on coordinating departmental and special interest Web pages, another with recommending institutional standards for imaging applications, and another on privacy. For more information about this model contact Anne Parker at anne_parker@unc.edu or see http://www.cause.org/information-resources/ir-library/text/cem9524.txt

Other resources

Researching the way other institutions have dealt with developing policy about privacy and other issues that arise in an electronic networked environment can be a valuable part of the process of policy building in this area. In addition to the experiences described here, several other resources on the World Wide Web are worth investigating. The University of Pennsylvania offers an excellent set of privacy resources, including the report of Penn's privacy task force, on their Web site (see http://www.upenn.edu/security-privacy/privacy.html). In addition, as part of the work of our CAUSE task force, a Web site at the University of Texas/Austin was developed to provide an index and hypertext links to nearly 100 policies that deal with privacy of student information at various colleges and universities, indexed by state location (see http://www.utexas.edu/computer/vcl/projects/privacy.html).

Also, at the CAUSE Web site (http://www.cause.org/) is a resource page that provides links to networked information policies that have been contributed to the CAUSE Information Resources Library, many of which are available electronically on the Web and linked from that page. The page (at http://www.cause.org/issues/policy.html) provides other related resources, such as links to the Electronic Frontier Foundation's guidelines for computing policies and sites addressing first amendment issues. Appendix H provides additional resources.

Highest Level Support

In addition to being an open process, the task force recommends that it be supported publicly at the highest levels of the college or university administration. Executive officers may even want to go beyond public endorsement of the process, actively receiving output from the discussions and/or personally charging groups to research and debate selected topics such as technology-related risk management and cost analyses, effects of process reengineering on privacy, and others.

Risk management discussions are important with respect to the security, integrity, and accountability of data. The acceptable risk level for one campus may be too great for another. Open discussions in this area can help to identify risks and clarify community values regarding acceptable and unacceptable risk levels. They can also help to identify ways in which technology might be deployed to reduce or eliminate risks for both individuals and the institution. It will be important to explore the costs of implementing security technologies compared to the potential costs of liability resulting from a violation of privacy. Open discussion of these and other values-related topics can help colleges and universities in strategic planning to identify those areas in which the greatest investment will reap the greatest benefits in line with institutional values and mission.

Seeing more efficient and effective ways of doing business has led some institutions to engage in process reengineering, which usually involves technology applications. Open discussion of the challenges facing colleges and universities that lead to process reengineering can foster increased understanding, community trust, and endorsement of the new processes. The partnerships that are established between data stewards, data owners, data users, and technology designers can be invaluable when they result in new and creative ways to maximally meet both the needs of the student/customer and the institution.

College and university communities will also be able to steer the identification and initiation of needed technological pilots if there are open discussions about these issues. Identifying units within colleges that are ready and eager to pilot new applications and discuss the pilot results can facilitate the process of evaluating new applications. Encryption and digital signature technology pilots are among those that may help campuses apply technology to protect privacy. Finding out whether such technologies will prove cumbersome to the community or be embraced by it would be enormous benefit before wide scale applications are implemented.

Based on Real Incidents

Finally, our task force recommends that values clarification and development of policy be based on specific incidents and issues. Sometimes a campus does not want to make public the incidents of misuse or abuse that have occurred for fear of liability for errors in information delivery or access that find one person in the middle of another's sensitive data. However, the community needs to be able to understand and relate directly to the issues at hand. More information shared, rather than less, will help to build community consensus and standards. At a minimum, information needs to be disseminated to the community to spark discussion — information about the dilemmas and any potential tradeoffs faced by the institution between efficiency and individual privacy. If it is an open and listening process, one of forming consensus and sharing different points of view, the community as a whole benefits with increased commitment to community values and the development of informed and supported policies

Appendix A: FERPA Overview

The information below is excerpted from the *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended,* edited by Richard Rainsberger, published by and available from the American Association of Collegiate Registrars and Admissions Officers (AACRAO, One Dupont Circle, NW, Suite 330, Washington, DC 20036-1171; 202-293-9161). Periodically amendments are made to FERPA regulations; the Department of Education's Web site provides access to such changes in the Federal Register Documents section under News (at http://www.ed.gov/news.html).

The purpose of the Family Educational Rights and Privacy Act of 1974, commonly referred to as the Buckley Amendment or FERPA, is to afford certain rights to students concerning their education records.

FERPA gives students who reach the age of 18 or who attend a postsecondary institution the right to inspect and review their own education records. Furthermore, students have other rights including the right to request amendment of records and to have some control over the disclosure of personally identifiable information from these records. Institutions may grant a student more rights than those guaranteed in the Act.

Institutions may not disclose information contained in education records without the student's written consent except under conditions specified in the Act. An institution is not required to disclose information from a student's education records to the parents of dependent students but may exercise its discretion to do so. It is the responsibility of an institution to ensure that information is not improperly disclosed to the parents of students.

Institutions must annually notify students currently in attendance of their rights by any means that are reasonable, such as publication of a notice in the student handbook, catalog, or student newspaper. The regulations do not specify the means to be used. Schools are not required by FERPA to notify former students of their FERPA rights.

FERPA deals specifically with the education records of students, affording them certain rights with respect to those records. For purposes of definition, education records are those records which are (1) directly related to a student and (2) maintained by an institution or a party acting for the institution. Records containing a student's name, Social Security number, or other personally identifiable information, in whatever medium, are covered by FERPA unless identified in one of the Act's excluded categories (see the definition of "Education Records" on page 40).

Educational institutions and agencies are required to conform to fair information practice. This means that persons who are fair subjects of data systems (i.e., students at an institution) must:

- be informed of the existence of such systems,
- have identified for them what data about them are on record,
- be given assurances that such data are used only for intended purposes,
- be given the opportunity to request an amendment or correction to their records, and
- be certain that those responsible for data systems take reasonable precautions to prevent misuse of the data.

Although the Act does not require it, those responsible for data systems are obliged to consider properly disposing of, or destroying, information when the conditions under which that information was collected no longer exist and there are no legal restrictions preventing such disposal.

FERPA applies to all schools that receive funding under most programs administered by the Secretary of Education. Most postsecondary institutions, both public and private, generally receive such funding and must, therefore, comply with FERPA.

Appendix B: Glossary of Terms

Authentication

A process that verifies the identification or genuineness of a person or service. Traditionally, authentication methods in networked computer systems include a user ID/password combination ("something you know"), a token ("something you have"), and/or biometrics identification ("something you are and cannot change").

Authorization

Access permissions or rights given to a user, process, or program. Usually, authorization is used in conjunction with the concept of authentication. Once a user has been authenticated, s/he may be authorized to have different types of access or activities.

Checksum

A computed value which depends on the contents of a block of data and which is transmitted or stored along with the data in order to detect corruption of the data. The receiving system recomputes the checksum based upon the received data and compares this value with the one sent with the data. If the two values are the same, the receiver has some confidence that the data were received correctly.

Data Mining

Analysis of data in a database using tools that look for trends or anomalies. These data can then be extracted in such a way that the new information is used for decision support, prediction, forecasting, and estimation.

Data Steward

Person or entity responsible for the management, integrity, and safeguarding of information. Data stewards have evolved to include not only traditional stewards such as registrars for student data, but also such people as database administrators.

Data Warehouse

A collection of data extracted from one or more production databases, housed in a separate database, providing fast and easy user access to "high-demand" information.

Digital Signature

Extra data appended to a message that identify and authenticate the sender and message data using public-key encryption.

Digitized Photograph

A photograph recorded in binary code and stored on computer-compatible media (for example, disk, tape, CD-ROM). Digitized photos are particularly easy to enhance, modify, or manipulate. Such photos can be stored in a database, outputted as a print or transparency, or converted for video-screen display from a CD-ROM or photo CD.

Digitized Signature

Image replicas of an individual's own handwritten signature obtained during a signing operation (much like the pads/signature recording devices beginning to be employed by major department stores).

Directory Information

Information about students of an institution that is considered part of the public record of their attendance and that may be made public unless the student specifically asks that it be suppressed. This may include some or all of the following: name, local address, local phone number, e-mail address, major field of study, participation in recognized activities and sports, weight and height of athletic team members, photograph, dates of attendance, most recent institution attended, degrees and awards received.

Disclosure

Permitting access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

EDI (Electronic Data Interchange)

A technology that uses standard data formats to transmit data from one computer to another. In higher education, EDI has been used to transmit student transcripts.

Education Records*

Those records directly related to a student and maintained by the institution or by a party acting for the institution. The term "education records" does not include the following:

- records of instructional, supervisory, administrative, and certain educational personnel which are in the sole possession of the maker thereof, and are not accessible or revealed to any other individual except a substitute who performs on a temporary basis (as defined in the institutional personnel policy) the duties of the individual who made the records.
- records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.
- records relating to individuals who are employed by the institution, which are made and maintained in the normal course of business, relate exclusively to individuals in their capacity as employees, and are not available for use for any other purpose. (Records of individuals in attendance at an institution who are employed as a result of their status as students are education records, for example, workstudy.)
- records relating to a student which are (a) created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional, acting in his/her professional capacity or assisting in a paraprofessional capacity; (b) used solely in connection with the provision of treatment to the student; and (c) not disclosed to anyone other than individuals providing such treatment, so long as the records can be personally reviewed by a physician or other appropriate professional of the student's choice. (Appropriateness may be determined by the institution.) "Treatment" in this context does not include remedial educational activities or activities which are part of the program of instruction at the institution.
- records of an institution that contain only information relating to a person after that person is no longer a student at the institution (for example, information gathered on the accomplishments of alumni).

Encryption

Any procedure used to convert plain text into cipher text in order to prevent any but the intended recipient from reading that data.

Identification

Any means of identifying an individual, physical or automated. A process that enables recognition of an entity by an automated information system is generally accomplished through the use of unique machine-readable user names.

Informed Consent

Permission given by an individual to another for some action, with such consent being well-founded in information and knowledge about the issues.

Legitimate Educational Interest

FERPA does not define "legitimate educational interest" but states that institutions must establish their own criteria according to their own procedures and requirements for determining when their school officials have a legitimate educational interest in a student's education records. However, the Department of Education has created a model notification of rights under FERPA for postsecondary institutions (in FERPA Final Rule, *Federal Register*, November 21, 1996) that includes the following statement: "A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility."

Log File

A collection of information, generally of machine and user activities, that shows sequence of machine transactions.

Middleware

Software that mediates between an application program and a network. Such software manages the interaction between disparate applications across heterogeneous computing platforms.

Monitoring
Watching or recording activity on a particular machine or network or by a particular user or set of users usually for system management purposes.

Personally Identifiable*
Data or information which include (1) the name of the student, the student's parent, or other family members; (2) the student's address; (3) a personal identifier such as a Social Security number or student number; or (4) a list of personal characteristics, or other information which would make the student's identity easily traceable.

Profiling
The process of gathering information about a particular individual or class of individuals for purposes of outlining/highlighting data such as their potential product interests or ability/desire to contribute to a particular philanthropy.

Record
Any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

School Official
FERPA does not define "school officials" but states that institutions must establish their own criteria according to their own procedures and requirements for determining them. However, the Department of Education has created a model notification of rights under FERPA for postsecondary institutions (in FERPA Final Rule, *Federal Register*, November 21, 1996) that includes the following description of a school official: "A person employed by the University in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the University has contracted (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

Sniffing
A process accomplished by a non-intrusive technical device, difficult to detect, placed on a network segment which collects and stores all data moving across that segment for later analysis and unauthorized use. Sniffing can be a legitimate and authorized tool for solving network problems, but it can also be misused.

Student*
Includes any individual for whom an educational institution maintains education records. The term does not include an individual who has not been in attendance at the institution. An individual who is or has been enrolled in one component unit of an institution, who applies for admission to a second unit, has no right to inspect the records accumulated by the second unit until enrolled therein.

World Wide Web (WWW)
A client/server software package which uses hypertext to organize, connect, and present information and services throughout the Internet.

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* This definition is excerpted from AACRAO's *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended.*

Appendix C: Summary of Task Force Recommendations for Each Principle of Fair Information Practice

Recommendations for Notification

◆ Institutions should notify students of their privacy rights with the same prominence and frequency afforded other important areas of campus life, such as residence-hall regulations, meal-plan options, and course descriptions. A useful comparison may be made between notification of campus judicial system regulations, which focus on student responsibilities and punishment, and notification of privacy policies about student records, which focus on student rights and abilities.

◆ The institutional approach to notification should also take into account the technological sophistication of the student body. This and other local considerations should be applied in order to provide useful and meaningful information to students. An effort should be made to avoid overwhelming detail on the one hand and overly vague generalities on the other.

◆ When formulating policies and procedures concerning student notification, campuses should consider the effects of the distribution of databases to non-centrally controlled systems, as well as transaction and tracking data maintained as a by-product of daily operations. Policy should determine how students can be informed of the existence of such databases and systems.

Recommendations for Minimization

◆ Colleges and universities should gather all legally required student information and the minimal amount of additional information to accomplish a legitimate institutional purpose, avoiding gathering nonessential information simply because of the ease of collection or correlation in networked environments. Policy and practice should address means to ensure that collection of personally identifiable information has been appropriately authorized.

◆ Campuses should formulate a process for determining necessary log elements and log retention requirements, particularly for logs where the inclusion of personally identifiable information is unavoidable.

◆ For those log elements over which the institution exercises control (rather than those that are a default of the operating system or vendor-supplied software), designers should consider the principle of minimization and identify those elements that would really be necessary in the event of foreseeable contingencies. Those elements rather than the superset of all possible elements should be collected.

Recommendations for Secondary Use

◆ The institution should be explicit about the purpose for which information is gathered at the time of its collection, and identify the routine and compatible uses of the data it expects to employ in the course of conducting official business.

◆ Secondary uses, not included in those stated as routine and compatible, should be avoided, but where such secondary uses are deemed significantly important to the institution, policy should consider how additional permissions will be obtained from affected students.

Recommendations for Nondisclosure and Consent

◆ During policy development, institutions should consider defining categories of information as to their sensitivity, determining under which strata elements of information fall, and establishing congruent consent/disclosure mechanisms for each type of information.

◆ In developing policy with regard to data categorization, institutions should consider the means for students to change the categorization of an element and to specify that it be treated as more sensitive than generic policy would normally dictate. The use of technology to facilitate individual choice in this area should be considered.

- Consent should be specific with regard to the manner and type of disclosure, as well as the identity of the recipients and their intended use of the information. The means by which students may revoke consent should be addressed during the policy development process.

- The institution should ensure that students fully understand what their rights are with regard to requesting that information not be disclosed.

Recommendations for Need to Know

- A clearly defined institutional policy should be adopted regarding access to student information, taking into consideration such criteria as job duties, purpose and scope of proposed use, and compliance with privacy regulations.

- Implementations of new technology applications should consider whether the system design supports institutional privacy policies and procedures, including the design of display and report formats to limit the amount of information displayed on a screen.

- Technology implementations should include the active involvement of not only information technologists but also data stewards to ensure system design that supports need-to-know policy decisions.

Recommendations for Data Accuracy, Inspection, and Review

- Students are responsible for providing accurate information about themselves for entry into college or university databases. However, institutions need to consider how distributed databases can be synchronized with the master data source so that students do not bear the responsibility for accuracy of their data in multiple databases. Institutions should also consider how such databases will be administered to increase consistency and employ good data management practices.

- Institutions should periodically ask students to review critical data for accuracy, and should consider the use of secure technology to allow students direct access to their own data to facilitate the inspection and review process.

- Institutional policy and procedures should address the issues of inspection and review of transactional data, defining records that can be made available and the related request process.

Recommendations for Information Security, Integrity, and Accountability

- The institution should address the development of policies, processes, and procedures that deal with the more critical physical and procedural security issues surrounding the widespread dissemination of student information via networks.

- The institution should take reasonable steps to protect the integrity of student records by ensuring that they are not unduly subject to inadvertent or intentional modification or deletion when collected, stored, manipulated, displayed, or disseminated using the institution's electronic information resources.

- Responsibilities for security should be formally defined; security and integrity issues should be considered an integral and mandatory part of the application design process at all levels; and individual system administrators and users should be provided technical guidelines and training related to security issues.

- Care should be taken in setting up systems to avoid inappropriate — but in many cases built-in — information access, such as world-readable log files or Web caches not cleared from user to user.

- Institutions should articulate procedures for how potential breaches in security or privacy will be handled.

Recommendations for Education

- Institutions should address the most effective methods in their environments to provide systematic instruction to students regarding their privacy rights and the potential implications of uses and misuses of information. Instruction should include information about aspects of the technology that may result in these uses and misuses, beyond simple notification and informed consent.

- The institution should ensure that faculty, staff, and administrators are also educated about the legal, ethical, and policy issues surrounding students' right to privacy.

Appendix D: Checklist for Privacy Policy and Fair Information Practices

The following is a checklist that will help guide the development or revision of policies on the handling of student information to ensure privacy and confidentiality. The task force suggests that the items below be addressed within the process outlined in section V, and within the framework of recommendations for policy and practice summarized in Appendix C.

The Principle of Notification

___ We have established procedures for notifying students about their privacy rights and responsibilities in a networked environment.

___ We have established procedures for notifying students about disciplinary action that will be taken when students violate the privacy rights of others.

___ We have established procedures for notifying students about what data are considered "directory information" and the medium for publishing such information — paper, campus intranet, public network.

The Principle of Minimization

___ We have a policy that addresses logging and/or monitoring individually identifiable online transactions and activity of students.

___ We have a policy that addresses logging and/or monitoring individually identifiable online transactions and activity of students at public workstations in computer labs.

___ We have established procedures for approving on-campus research using online data, including collecting data about how students use the campus network.

___ We have an institution-wide policy that addresses issues related to the sources, collection, storage, and purging of student information in a networked environment.

___ We have a policy about the collection of contingency data to manage institutional risk.

The Principle of Secondary Use

___ We have a policy about what students should be told at the time of enrollment about possible secondary use of information they provide.

___ We have a policy that addresses the potential to create new, potentially confidential information from existing data that have been collected by the institution.

___ We have defined the routine and compatible uses of data the institution expects to employ in the course of conducting official business.

The Principle of Nondisclosure and Consent

___ We have a policy that addresses nondisclosure and consent issues that arise in a networked environment, such as what information may be posted on the World Wide Web, with or without consent, and by whom.

___ We have a policy on nondisclosure and consent that addresses institutional ownership versus student ownership of such student information as digitized signatures and photographs.

___ We have a policy that addresses issues of sensitivity of data, congruent consent/disclosure mechanisms, and the ability of students to request that data be treated as more confidential or to revoke consent.

___ We have a policy that addresses requests for access to student records by parents.

___ For the purpose of consistency among our policies, we have defined what constitutes an "emergency request" for student e-mail or other electronic records.

___ We have a policy outlining procedures for handling subpoenas requesting access to student e-mail and computer records.

____ We have a policy that addresses the confidentiality of electronic mail and articulates standards for handling e-mail by system administrators and others in the campus community.

___ We have a policy that addresses what types of information are appropriate for transmission by electronic mail.

The Principle of Need to Know

___ We have an institution-wide policy about access to student information that includes definition of a school official and what the institution considers legitimate educational interest, to guide decisions about who has a "need to know."

___ We have procedures in place to ensure that new or reengineered automated systems will support privacy rights.

___ We have identified which administrators can approve a search of student e-mail boxes or confidential records.

___ We have identified who may have access to systems transactions and under what circumstances (for example, monitoring for the purposes of system administration).

___ We have a policy requiring frequent review of job categories for need-to-know access.

___ We have a policy requiring a review of need-to-know status when databases are created or merged.

___ We have a policy about which administrators can have access to student disciplinary information in computer abuse cases.

The Principle of Data Accuracy, Inspection, and Review

___ We have a policy and procedures about when and how students can change their own online directory information.

___ We have a policy and procedures that address the administration of multiple and/or distributed databases to ensure good institution-wide data management practices.

___ We have a policy and procedures that address the issues of inspection and review of transactional data.

The Principle of Information Security, Integrity, and Accountability

___ We have a policy on the security of passwords.

___ We have identified authentication methods for online commerce.

___ We have a policy regarding level of security/encryption required for sensitive data transmitted through the campus network.

___ We have a policy regarding level of security/encryption required for sensitive data transmitted through public/untrusted networks.

___ We have a policy with regard to integrity checks for sensitive or mission-critical data transmitted through the campus network or through public/untrusted networks.

___ We have policies regarding appropriate host and network security geared to the sensitivity of data.

___ We have identified and publicized appropriate sanctions to be levied in cases where students alter online data owned by the institution or data of other students.

___ We have a security policy that formally defines responsibilities for security, encourages the consideration of security in applications development and design, and articulates procedures for how potential security breaches will be handled.

___ We have a training program that ensures that system administrators and users are provided technical guidelines related to security issues.

The Principle of Education

___ We have established a program to provide instruction to students about their privacy rights and the potential implications of uses and misuses of electronic information resources, including awareness about the institution's policy on e-mail confidentiality.

___ We have established an educational program to ensure that faculty, staff, and administrators are educated about the legal, ethical, and policy issues surrounding students' right to privacy.

Appendix E: Additional Information Principles

A Code of Fair Information Practice

The following code of fair information practice is excerpted from House Report 103-601 Part V and is derived from several sources, including codes developed by the Department of Health, Education, and Welfare (1972 report); Organization for Economic Cooperation and Development (1981); and the Council of Europe Convention (1981). It was provided to our task force by privacy and information policy consultant Robert Gellman.

1. The Principle of *Openness*, which provides that the existence of record-keeping systems and data banks containing data about individuals be publicly known, along with a description of main purpose and uses of the data.
2. The Principle of *Individual Participation*, which provides that each individual should have a right to see any data about himself or herself and to correct or remove any data that is not timely, accurate, relevant, or complete.
3. The Principle of *Collection Limitation*, which provides that there should be limits to the collection of personal data, that data should be collected by lawful and fair means, and that data should be collected, where appropriate, with the knowledge or consent of the subject.
4. The Principle of *Data Quality*, which provides that personal data should be relevant to the purposes for which they are to be used, and should be accurate, complete, and timely.
5. The Principle of *Use Limitation*, which provides that there must be limits to the internal uses of personal data and that the data should be used only for the purposes specified at the time of collection.
6. The Principle of *Disclosure Limitation*, which provides that personal data should not be communicated externally without the consent of the data subject or other legal authority.
7. The Principle of *Security*, which provides that personal data should be protected by reasonable security safeguards against such risks as loss, unauthorized access, destruction, use, modification, or disclosure.
8. The Principle of *Accountability*, which provides that record keepers should be accountable for complying with fair information practice.

Principles of Information Privacy

By Robert Ellis Smith, Publisher, *Privacy Journal*

Adapted from *Our Vanishing Privacy* (Loompanics, 1993) Copyright 1993 Robert Ellis Smith. Reprinted with permission.

Information collectors are constantly saying, "Privacy is a vague concept. It means different things to different people." In fact, over the past two decades a substantial amount of study has gone into privacy issues — always with an eye to developing principles that will guide those who develop information systems. Some of the principles that follow have widespread agreement among experts in the privacy field; others are fairly new and untested.

1. There must be no personal-information systems whose very existence is secret.
2. There must be a way for a person to find out what information about him or her is in a record and how it is used.
3. There must be a way for a person to prevent personal information that was obtained for one purpose from being used or made available for other purposes without the consent of the person.
4. There must be a way for a person to correct or amend a record of identifiable information about the person.
5. Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the information for its intended use and must take precautions to prevent misuse of the data.
6. Any systems of records about people must have a purpose that is socially desirable, and only relevant information should be collected.
7. To the maximum extent, personal information should be gathered from the individual himself or herself.

8. The keepers of personal information should act in the role of trustee, safeguarding the information and using it in the best interests of the individual but not "owning" it.

9. Privacy interests should be considered specifically in the design and creation of new data systems, communications services, and other new technology that affects the interests of individuals.

10. Privacy protections, as much as possible, should be tailored to the needs of each individual, and each individual should be able to choose from among various degrees of privacy protections, perhaps bearing an additional cost for special services.

11. A company or government agency that compromises current expectations of privacy should be obligated to offer a means of restoring the lost degree of privacy at no cost to consumers.

12. Information provided to a business or government agency by a person should be used only in connection with services or benefits sought by the person, unless the person agrees otherwise.

13. Privacy expectations may change over time, as new technology, new markets, new attitudes, and new social concerns emerge.

14. When information is disclosed for commercial purposes, an individual ought to have a means to "opt out" by having his or her information not disclosed.

15. The concept of privacy applies only to actual persons, not to organizations. It applies only to information that identifies an individual (by name, number, or otherwise), not to cumulative or anonymous information.

16. Privacy problems lend themselves to negotiation and complaint resolution, often on a case-by-case basis, rather than hard-and-fast legal language.

17. Personal information provided to a third party (for processing or billing or research) is governed by the same protections applicable to the original keeper of the records.

18. Personal information may be transferred from one country to another only if the second country has privacy protection at least equal to those of the first country, unless the first country provides special permission.

19. Information used by a government agency should be available to citizens in two formats: in the media (whether electronic or otherwise) used by the agency itself, and in the form that is usable and readable to a person without electronic media.

20. In the absence of factual suspicion, overhearing private conversations or viewing people's personal activities from afar with technological enhancements is unethical.

Sources:

The first five principles of information privacy were originated by a study committee in the U.S. Department of Health, Education, and Welfare in 1973, and endorsed later by an IBM Corporation study and by the organization of Computer Professionals for Social Responsibility. This "Code of Fair Information Practice" appears again and again in laws passed since 1973, including the federal Privacy Act, state fair information practice acts, and national laws enacted by European countries.

Principle 6 is part of the 1981 privacy guidelines of the Organization for Economic Cooperation and Development (OECD) in Europe.

Principle 7 is part of the federal Privacy Act.

There is less agreement about Principle 8, which is not yet a part of any recognized code of practice.

Principles 9-13 are based on principles published in 1991 by the New York State Public Service Commission, under the leadership of Commissioner Eli Noam. Principles 10 and 11 together mean that customers or citizens should not have to pay to preserve the privacy status quo; however, customers or citizens choosing a greater degree of protection should expect to bear at least part of the cost themselves. Many European nations have adopted a variation of Principle 12, saying that an individual is entitled to know from the beginning the purpose for information he is asked to provide.

Principle 14 is promoted by the direct-marketing industry and others. It begs the question of whether people know the consequences of "opting out" and whether information should be collected or disclosed at all.

The first part of Principle 15 is a general concept of law. Businesses may have an interest in secrecy or confidentiality but this is different from the uniquely individual right of privacy.

In the U.S. there is no general agreement on Principle 16, which seems to guide policy makers in Europe, Australia, and Canada.

Principle 17, part of the federal Privacy Act, assures that processing or research organizations merely act as the agent of the original organization when it comes to handling personal information entrusted to the third party. As a condition of using information from the first organization, the third party agrees to be bound by the first organization's privacy safeguards.

Principle 18 is required by law in Austria, Denmark, France, Sweden, and the United Kingdom, and is part of guidelines drafted by the European Community to apply to all European countries.

Principle 19 is a concept of freedom of information developed by the author. Principle 20 was developed by the author.

Appendix F: Input to this Report

In fulfilling our charge, the task force sought input from many different segments of the academic community. We are grateful for the thoughtful and insightful input we received from each of these sources — administrators, staff, students, and agency and association representatives.

Input from Student Services Administrators and Information Technology Professionals

To better understand the visions, demands, needs, and concerns of the people who traditionally are responsible for collecting, storing, handling, managing, and releasing student information, members of the task force first surveyed the bursars, admissions officers, registrars, and financial aid officers from our own campuses. Additionally, we conducted phone interviews with persons in these same roles on other campuses, asking the following questions:

- What types of records do you maintain and collect?
- What law/policy guides your practices in this area?
- Who are you able to release this information to internally? Externally?
- Where would you like to be in three years regarding electronic handling of data?
- What issues do you see in this regard?

Additionally, the task force solicited input from the CAUSE membership, most of whom are information technology professionals, by requesting contributions of privacy policies, examples of privacy incidents, and identification of key issues.

Individuals from each of the following institutions provided information, responses, and/or comments to members of the task force either in person, via telephone, or via electronic mail. While they did not intend to represent the official position of their institutions, they provided invaluable insight into the dilemmas they face, the questions and concerns they have, and the pressing issues and problems to be resolved.

Arizona State University
Boston College
Brown University
California Lutheran University
California State University System
Carnegie Mellon University
Central Washington University
Central College (Iowa)
Columbia University
Cornell University
Dickinson College
Harvard University
Indiana University
Johns Hopkins University
Lansing Community College
Maricopa Community Colleges
McMaster University
Massachusetts Institute of Technology
Mt. Hood Community College
Northwestern University
Pennsylvania State University
Portland State University
Princeton University
San Diego State University
Seminole Community College
St. Louis University
Simon Fraser University
Sonoma State University
Tufts University
University of Connecticut
University of Delaware
University of Kansas
University of Maryland/College Park
University of Michigan/Ann Arbor
University of New Mexico
University of North Carolina/Chapel Hill
University of Oregon
University of the South
University of Santa Cruz
University of Southern California
University of Tennessee/Knoxville
University of Texas/Austin
University of Virginia
University of Wisconsin/Madison
West Virginia University

Survey of Student Attitudes

Members of the task force also gathered information and comments about electronic access to private and public personal information from students. The task force conducted informal surveys, collecting informal, non-random data from students at the University of Michigan, Pennsylvania State University, the University of the South, the University of Texas at Austin, Indiana University, and MIT. These were not intended to be statistically significant or controlled research studies by any means; however, they did provide anecdotal information regarding some student attitudes and concerns.

Students were asked to rank their preferences on how strongly they felt certain information should be protected, or if it was free to be published within the institution and beyond. The student information types varied from directory information to more personal information.

In general, students felt it was permissible for information traditionally defined as directory information under FERPA (name, address, phone number) to be published within and beyond their institution, such as to other colleges and universities, but not to the general public. A small minority felt this information should be accessible only to others within their institutions. Generally, students felt it was inappropriate for permanent addresses and phone numbers to be published, preferring that only their school addresses be published.

Regarding more personal information, most students were in favor of protecting these records from anyone other than those officials authorized to access the data and the students themselves for review of the files. This view was held whether the frame of reference was within the university, beyond the university to other scholars, or to the general public.

A class of MIT students were asked to identify the pros and cons associated with the institution putting student photos on the Web. Students were thoughtful about the issues, identifying both valuable uses and potential misuses. While they recognized the potential benefits to faculty of having access to student photos, they generally felt that the photos should have restricted access within the university community, and that the placement of photos on the network needed to be fully within the decision-making purview of each student.

Reviewers

Our task force asked a number of individuals with specific institutional or organizational perspectives to review this paper and provide input prior to publication. We are grateful to those who responded to our request:

Robert Atwell, President Emeritus
American Council on Education

Wayne Becraft, Executive Director
AACRAO

Herbert Evert, Associate Registrar
University of Wisconsin/Madison

Susan J. Foster, Vice President, Information Technologies
University of Delaware

Robert Gellman, Privacy & Information Policy Consultant

Marjorie Hodges, Policy Advisor
Office of Information Technologies
Cornell University

Steve Jarrell, Executive Director
Administrative Information Services
University of North Carolina/Chapel Hill

Paula T. Kaufman, Dean of Libraries
University of Tennessee/Knoxville

Anne Oribello, Information Security Officer
Brown University

Rodney Petersen, Coordinator, Policy and Planning
Academic Information Technology Services
University of Maryland/College Park

Richard Rainsberger, Registrar
Central College (Iowa)

LeRoy Rooker/Sharon Shirley
Family Policy Compliance Office
Department of Education

Barbara Simons, Chairperson
United States Policy Committee
Association for Computing Machinery

Duane Webster, Executive Director
Association of Research Libraries

Donald J. Wermers, Registrar
University of Wisconsin/Madison

Appendix G: References

Alderman, E., and C. Kennedy. *The Right to Privacy,* New York: Alfred A. Knopf, 1995.

Allmendinger, Susan. "Internet-Worthy: Getting Students Fit for the Road." *CAUSE/EFFECT,* Spring 1995, 56-57.

American Association of Collegiate Registrars and Admissions Officers (AACRAO). *Guidelines for Post Secondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 As Amended.* Washington, D.C.: AACRAO, 1995.

Askins, Peggy C. (ed). *Misrepresentation in the Marketplace and Beyond: Ethics Under Siege.* Washington, D.C.: AACRAO, 1996.

Baase, Sara. *A Gift of Fire: Social, Legal, and Ethical Issues in Computing.* New York: Prentice-Hall, 1996.

Bernbom, Gerald, Mark Bruhn, and Dennis Cromwell. "Security in a Client/Server Environment." *CAUSE/EFFECT,* Winter 1994, 19-26.

Branscomb, Anne Wells. *Who Owns Information? From Privacy to Public Access.* New York: Basic Books, 1994.

Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. §552a(o) (1988).

Computerization and Controversy: Value Conflict and Social Choices. Edited by Charles Dunlop and Rob Kling. Boston: Academic Press, 1991.

Computers, Ethics & Social Values. Edited by Deborah G. Johnson and Helen Nissenbaum. Englewood Cliffs, N.J.: Prentice-Hall, 1995.

Electronic Communication Privacy Act of 1968, codified as amended at 18 U.S.C. §§2510-21 (1988).

Electronic Privacy Information Center. "Privacy Guidelines for the National Information Infrastructure: A Review of the Proposed Principles of the Privacy Working Group." Report 94-1. In EPIC database [database online]. See http://www.epic.org/privacy/internet/EPIC_NII_privacy.txt

European Parliament and Council of the European Union. *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.* Brussels, 1995.

Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g (1996).

Graves, William H., Carol G. Jenkins, and Anne S. Parker. "Development of an Electronic Information Policy Framework." *CAUSE/EFFECT,* Summer 1995, 15-23.

Hodges, Marjorie W., and Steven L. Worona. "Legal Underpinnings for Creating Campus Computer Policy." *CAUSE/EFFECT,* Winter 1996, 5-9.

Information Infrastructure Task Force. Information Policy Committee. Privacy Working Group. "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information." Final version. June 6, 1995. In EPIC database [database online].

Jacobson, Carl. "Internet Tools Access Administrative Data at the University of Delaware." *CAUSE/EFFECT,* Fall 1995, 7-12.

Johnson, T. "Protecting Privacy in the Face of Technology." *Risk Management* 88 (May 1992).

Johnson, T. Page. "Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974 (FNa)." West Publishing Company, 1993. In Westlaw database [database online], 79 WELR 1, 79 Ed. Law Rep. 1.

Kallman, E., and S. Sherizen. "Privacy Matters." *Computerworld,* 23 November 1992.

Litigation Under the Federal Open Government Laws. 17th ed. Edited by Allan R. Adler. Washington, D.C.: American Civil Liberties Union Foundation, 1992.

Marx, E. "Encrypting Personal Identifiers." *Health Services Research* 29:2 (June 1994).

McLaughlin, J.A. "Intrusions Upon Informational Seclusion in the Computer Age." *John Marshall Law Review* 17:831-839 (1984).

National Research Council Computer Science and Telecommunications Board. *For The Record: Protecting Electronic Health Information*. Washington, D.C.: National Research Council, 1997.

Organisation for Economic Co-operation and Development. "OECD Recommendation Concerning and Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data." O.E.C.D Document C(80)58 (Final). 1980. In EPIC database [database online]. Available on the Internet at http://cpsr.org/cpsr/privacy/privacy_international/international_laws/ 1980_oecd_privacy_guidelines.txt

Porter, John D., and John J. Rome. "Lessons Learned from a Successful Data Warehouse Implementation." *CAUSE/EFFECT*, Winter 1995, 43-50.

Privacy Act of 1974, 5 U.S.C. §552a (1996).

Privacy Rights Clearinghouse. *First Annual Report of Privacy Rights Clearing house*. San Diego, California: Center for Public Interest Law, University of San Diego, 1994.

Privacy Rights Clearinghouse. *Second Annual Report of Privacy Rights Clearing house*. San Diego, California: Center for Public Interest Law, University of San Diego, 1995.

Rainsberger, Richard. *FERPA and Secondary Education: The Family Educational Rights and Privacy Act of 1974 as Amended and the Student*. Washington, D.C.: AACRAO, 1997.

Rezmierski, Virginia. "Electronic Communication: Vapor or Paper?" In *The Use and Abuse of Computer Networks: Ethical, Legal, and Technological Aspects*. Preliminary report based on a conference held December 17 to 19, 1993, at the Arnold and Mabel Beckman Center of the National Academies of Sciences and Engineering, Irvine, California. Washington, D.C.: American Association for the Advancement of Science, 1994.

__________. "Managing Information Technology Issues of Ethics and Values: Awareness, Ownership, and Values Clarification. *CAUSE/EFFECT*, Fall 1992, 12-19.

Smith, H. Jeff. *Managing Privacy: Information Technology and Corporate America*. Chapel Hill, N.C.: University of North Carolina Press, 1994.

Smith, Robert Ellis. *Compilation of State and Federal Privacy Laws*. 1992 ed. Providence, R.I.: *Privacy Journal*, 1992.

U.S. Department of Commerce. "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information." Washington, D.C., 1995. In United States National Information Infrastructure Virtual Library [database online]. Available on the Internet at gopher://www.ntia.doc.gov:70/H0/policy/privwhitepaper.html.

U.S. Department of Education. *Education Data Confidentiality: Two Studies*. Washington, D.C.: U.S. Government Printing Office, 1994.

U.S. Department of Health, Education, and Welfare. Office of Technology Assessment. "Protecting Privacy in Computerized Medical Information." Washington, D.C.: U.S. Government Printing Office, 1973.

U. S. Privacy Protection Study Commission. "Personal Privacy in an Information Society." Washington, D.C.: U.S. Government Printing Office, 1977.

Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy." *The Harvard Law Review*. 4, no. 5 (December 15, 1890): 193-220.

Webster, Sally, and Frank Connolly, "When Bad Things Happen to Good Campuses," *CAUSE/EFFECT*, Spring 1996, 44-48.

Westin, Alan F. *Privacy and Freedom*. New York: Athenium, 1967.

Appendix H: Resources

AACRAO

The American Association of Collegiate Registrars and Admissions Officers (AACRAO) is a nonprofit, voluntary professional association of more than 8,800 higher education administrators who represent more than 2,300 institutions and agencies in the United States and abroad. AACRAO's *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended* (Richard A. Rainsberger, et al.; 1995; 124 pp; Item #1246) updates current terminology, requirements, procedures, and strategies for compliance, issues such as SPEEDE/ExPRESS, fax, and parental access, student directories, and annual notification of students. The AACRAO Government Relations Department offers a weekly electronic newsletter through the Govrel-L listserv that contains timely information on important subjects, including FERPA and privacy issues. AACRAO's Web site can be found at http://www.aacrao.com/

CAUSE

CAUSE serves as a clearinghouse for information on managing and using information resources in higher education. Its Information Resources Library is an international repository for documents contributed by member campuses, *CAUSE/EFFECT* journal articles, and conference papers. Information about and access to the library is available through the CAUSE Web server (http://www.cause.org/).

Also at the CAUSE Web site is a resource page that provides links to networked information policies that have been contributed to the library, many of which are available electronically on the Web and linked from that page. The page (at http://www.cause.org/issues/policy.html) provides links to related resources, such as the Electronic Frontier Foundation's guidelines for computing policies.

Among the resources listed on the CAUSE policy page is a site at the University of Texas/Austin, developed as part of the task force's efforts, which provides an index and hypertext links to nearly 100 policies that deal with privacy and the handling of student information at various colleges and universities, indexed by state location (see http://www.utexas.edu/computer/vcl/projects/privacy.html).

Computer Security Institute

This membership organization, located in San Francisco, publishes materials and sponsors workshops on the latest in computer security hardware and policies. For further information, call 415-905-2626 or send e-mail to 71702.402@compuserve.com

Electronic Frontier Foundation (EFF)

The Electronic Frontier Foundation is a non-profit civil liberties organization working in the public interest to protect privacy, free expression, and access to public resources and information in new media. EFF's Web site, at http://www2.eff.org, provides a wealth of information related to this subject.

Electronic Privacy Information Center

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC's Web site (at http://www.epic.org) provides legislative updates on these issues and more.

Privacy Journal

Privacy Journal is an independent monthly publication on privacy in a computer age available on a subscription basis. Other privacy-related publications are offered through the journal. Inquire at P. O. Box 28577, Providence, RI 02908 (e-mail 0005101719@mcimail.com).

U. S. Department of Education, Family Policy Compliance Office

This government office enforces the requirements of the Family Educational Rights and Privacy Act and can clarify its requirements. For further information, contac LeRoy Rooker in the Family Policy Compliance Office (leroy_rooker@ed.gov).

CAUSE

CAUSE is an international nonprofit association dedicated to enabling the transformational changes occurring in higher education through the effective management and use of information resources — technology, services, and information. Incorporated in 1971, CAUSE serves its membership of over 1,400 campuses and organizations and nearly 4,000 individuals from its headquarters in Boulder, Colorado.

CAUSE is an Equal Opportunity Employer and is dedicated to a policy that fosters mutual respect and equality for all persons. The association will take affirmative action to ensure that it does not discriminate on the basis of age, color, religion, creed, disability, marital status, veteran status, national origin, race, sex, or sexual orientation, and encourages members and other participants in CAUSE-related activities to respect this policy.

The Use of Electronic Data Interchange under the Family Educational Rights and Privacy Act

by Paul T. Rhinehart

Among the many technologies that continue to transform our colleges and universities, one of the latest is electronic data interchange, or EDI. When used in the student records area, EDI allows electronic student records to be fed directly into a receiving institution's database, instead of being sent by mail. While this process offers many clear advantages, one important question that needs to be addressed is how will students' privacy be protected under this new means of transmission?

"... FERPA, having been written over twenty years ago, does not explicitly address EDI."

The application of electronic data interchange (EDI) in the area of student records in higher education has been recent and rapid. EDI was first developed for use in banking (the familiar ATM, for example) and the trucking industry, with application in higher education student records transmission emerging in the late 1980s. One pioneer was the Georgia Institute of Technology, which in 1989 started to accept student "flat file" applications for admission electronically. Georgia Tech viewed the process as a method of speeding the application process, reducing time spent in data entry, and also recruiting technically advanced applicants.[1]

To date there are approximately 459 institutions involved at some stage of EDI implementation. The widest application has been in the task of transmitting transcripts between institutions during the admissions process. For example, in Florida over 250,000 student records are exchanged within the state per year by EDI. The University of Texas at Austin has received over 40,000 transcripts via EDI.[2]

And the process could very well soon go national. The American Association of Collegiate Registrars and Admissions Officers (AACRAO) has developed a system of EDI known as SPEEDE/ExPRESS and has gained government acceptance for its X.12 standard protocol. This is an important step, in that it provides uniformity in transmission. The Department of Education is also supporting the use of EDI. Further, major organizations such as The College Board and Peterson's are developing national electronic clearinghouses of student data, for the purpose of transmitting batches of student applications and records, and helping schools and students "find each other."[3]

As the use of EDI of student data continues to increase, one concern is the legal protection of privacy afforded students under this new technology. Currently, student record privacy is protected under the Family Educational Rights and Privacy Act of 1974, known as the Buckley Amendment or FERPA.[a] However, FERPA, having been written over twenty years ago, does not explicitly address EDI. Thus, college and university officers are left with the following sources for guidance:

- new interpretations of the existing FERPA legislation,

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Note: Alphabetical reference annotations refer to code and legal citations, found as endnotes to this article.

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[1] Barbara H. Palmer and P. Betty Wei, "SPEEDE Made Easy," *College & University*, Fall 1993, pp. 4-13; Deborah Smith, Admissions Director, Georgia Institute of Technology, phone interview by author, September 1994; Jeffrey R. Young, "Admissions by Modem," *The Chronicle of Higher Education*, 20 July 1994, pp. A25-A27.

[2] American Association of Collegiate Registrars and Admissions Officers, SPEEDE/ExPRESS Activity List (Washington, D.C.: American Association of Collegiate Registrars and Admissions Officers, 1996).

(footnotes continued)

- extension of principles established in past case law concerning FERPA, and
- the world of electronic banking, where, because of EDI's early application, there are already established procedures, legislation, and case law.

At least one of these sources, past case law concerning FERPA, is especially slim, because there have been very few court cases addressing FERPA. One reason for this is FERPA stipulations which require that the Department of Education's FERPA Office resolve most complaints administratively. Another reason is the absence of any allowance in FERPA for private action and recovery of damages as a result of violation of FERPA protection. Also, given the novel nature of EDI, there is especially a dearth of case law here; traditionally, legislation/jurisdiction experience a time lag behind technological change. The topic is, however, currently being researched by the FERPA office.[4]

EDI of Directory Information

To begin the analysis, there are two categories of student information, according to FERPA (a)(5)(A): "directory" information and "nondirectory" information. Directory information consists of students' names, addresses, telephone listings, dates of birth, major fields of study, and so forth, which are already officially available to the public. FERPA (a)(5)(B) does state that the student must have a chance to request nonrelease of directory information. However, barring such a request, directory information in fact must be made available to the public under the Freedom of Information Act (FOIA).[b] Thus, as long as student data clearly fall into the category of directory information and the student has not requested non-release, there will be no primary privacy concerns with EDI.

There has been some judicial controversy, however, concerning when certain student data are or are not properly directory information. In judicial rulings concerning this question, the courts attempt to balance FOIA vs. FERPA—"the privacy interest of the student is weighted against the genuine need of the party requesting the information for its disclosure."[c]

From the case law, one can discern the following guidelines for circumstances when directory information is not disclosable:

(1) When student information is matched with achievement test scores. The test scores themselves must be disclosed; however, names and social security numbers must be presented in a masked and scrambled format.[d]

(2) When it accompanies other student statistical data, in this case number of transfer students, exams taken for transfer purposes, and sponsoring schools. Again, the school must release the statistics, but without names and addresses or other personally identifiable information.[e]

(3) When the school has no published policy of release of directory information, as required under FERPA. Said the Supreme Court of New Hampshire, student name and address data are protected as an extension of the privacy of the home as protected under the fourth and fifth U.S. Constitution Amendments, and release of this data would place the children "at the mercy of pedophiles and other criminals who could do them harm."[f]

Further cases have provided the following:

- Social Security numbers do not constitute directory information.[g] However, FERPA (b)(1)(D) allows the school to release identifiable individual data, even including course grades, without consent to an employer who sponsored the student in the course.[5,h]
- Information concerning the funding of individual athletic students is not "educational records" protected by FERPA. An athletic conference is not an "educational agency," and so is not subject to the authority of FERPA.[i]

Presumably, such distinctions as are made in the above cases are independent of the mode of transmission, and so would be applied exactly the same under EDI. The only difference may be that with EDI the question of privacy protection will perhaps become more intense because of: (1) the sheer increase in volume of data transmitted, and (2) its concentrated possession by central clearinghouses, with the data's obvious value to marketers.[6]

EDI of Nondirectory Information

There is more reason to be concerned about the use of EDI with respect to the release of nondirectory information. Nondirectory information is not public knowledge under FERPA, and so its privacy is guarded much more closely. There are several provisions of FERPA which would be of particular interest under EDI.

Will written consent be required?

First, one of FERPA's major concepts is that no nondirectory information should be disclosed without written permission of the subject (or parents) [(b)(1)]. However, since most use of EDI takes place within the admissions process, technically permission is not required. This is because, according to FERPA (b)(1)(B), there are several exceptions to the consent requirement, among them: release of data to "officials of

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[3] Department of Education, National Center for Education Statistics, *SPEEDE/ExPRESS: An Electronic System for Exchanging Student Records* (Washington, D.C.: U.S. Department of Education, National Center for Education Statistics, 1993); Palmer and Wei, p. 5; Young, p. A26; AACRAO official, phone interview by author, September 1994. A wealth of information about SPEEDE/ExPRESS is available on the AACRAO Gopher (gopher://aacrao-dec.nche.edu) in the SPEEDE/ExPRESS folder. See also AACRAO's *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended* (1995).

[4] T. Page Johnson, "Mana ing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974," *West's Education Law Quarterly* 2 (April 1993): 260-76; Robert F. Curran, S.J., "Student Privacy in the Electronic Era: Legal Perspectives," *CAUSE/EFFECT*, Winter 1989, pp. 14-18; James Daly, "Constitutional Scholar Calls for 'High-Tech' Amendment," *Computerworld*, 1 April 1991, p. 99; Joanne Goode and Maggie Johnson, "Putting Out the Flames: The Etiquette and Law of E-Mail," *Online*, November 1991, pp. 61-65; FERPA official, phone interview by author, September 1994; interview of AACRAO official.

[5] Margaret J. Barr and Associates, *Student Services and the Law: A Handbook for Practitioners* (San Francisco: Jossey-Bass, 1988).

(footnotes continu

schools or school systems in which the student seeks or intends to enroll ..." Other exceptions listed include release of data to educational officials within the institution, and to certain government bodies, for example. FERPA here follows similar provisions in the Privacy Act of 1974[j] which addresses information held by government agencies, and which similarly allows exceptions for "routine uses."[7]

> *"Now, extending the application of EDI yet further, assuming that the school does obtain consent, must such consent really be 'written'?"*

Thus, transcripts could be sent without any prior written consent.[8] The institution to which the student had applied could merely request the information on its own from the source institution. If this were to occur, the source school would still have to observe the following FERPA stipulations protecting the student's privacy: the school must publish its policy of what it will release and to whom; the student must have a chance to request non-release [(a)(5)(B)]; and the student must receive notice each time information is sent [(b)(1)(B)].

Nevertheless, even though it is not technically required, most institutions will most likely seek some form of written consent from the student. In fact, under the current process, most institutions require students' written consent each time a transcript is requested. This process seems to result from (1) the fact that the school collects a fee for each transcript, and (2) there is no established popular procedure by which one institution directly requests a transcript from another.

Prospectively, however, when EDI is brought into the picture, there is yet another reason that schools may wish to require written consent—namely, there is the problem of the as-yet unproven and possibly risky method of transmission. Thus, the school may wish to have the student sign a waiver referring to the electronic mode of transmission, with language to the effect that, "I give the institution permission to release my transcript electronically to requesting educational institutions." Indeed, the original AACRAO *Legal Guide* of 1984 includes a whole addendum of such canned clauses, and similarly the Electronic Fund Transfer Act (EFT) of 1978[k] provides for the Federal Reserve Board to issue such canned clauses for banks to include in signed documents.[9]

When will consent be required?

Thus, given that the institution using EDI does continue to seek the student's written consent for transcript release, the issue next arises as to when or how often that written consent will be required. In other words, given that the institution had obtained the student's permission to use EDI by a blanket waiver as above, there would be no reason that the institution could not then conduct all future transmissions to schools to which the student had applied on a simply automatic basis. Any fee collection could be done by automatic billing. There would be no need to obtain the student's permission for each individual transaction, but rather the scenario would work very conveniently as follows: (1) the student submits his application for admission; (2) the prospective school merely notifies the source school by EDI of the application; (3) according to prestated authorization, the source school simply sends the transcript by EDI; (4) the sending institution gives the student subsequent notification as required by FERPA.[10]

Could electronic consent be used?

Now, extending the application of EDI yet further, assuming that the school does obtain consent, must such consent really be "written"? The question arises because in order to deploy EDI to its fullest advantage, one would envision a situation of electronic consent. However, this threatens the very aspect of FERPA which requires that the consent must be written, i.e., by signature.[11]

It would be very convenient, indeed, for the institution to be able to accept authorization via electronic communication with the student, and so the question arises of what exactly could suffice as official authorization. The use of paper by mail in today's modern age is beginning to seem ever more inconvenient to today's consumers, including students, who are used to faster means such as ATM bank machines.

According to FERPA officials, the law as it now stands requires a paper signature. However, the trend may be toward the acceptance of electronic verification procedures, such as passwords, as modeled on the emerging use of such passwords in electronic fund transfers (EFT) and ATM use in banking.[12]

Obviously, this creates definite security questions, as it somehow seems less secure to rely on the secrecy of a password or PIN number (as employed in many colleges and universities in telephone registration systems) than a written signature. (But one wonders, with the pace of technology, will signatures be able to be collected by means of people writing with electronic pens on the screen itself, as used in the Apple Newton, for example?)

Indeed, if FERPA were to be construed along the lines of the EFT Act, it would allow the legality of passwords for discrete transactions. Under the provisions of the EFT Act, written means do still play a part, but more as a kind of meta-authorization signed by the customer very early in the

terview of AACRAO official; P. Friedenberg, Enrollment Management, Touro College, New York, phone interview by author, August 1994.

[7] David F. Linowes and Colin Bennett, "Privacy: Its Role in Federal Government Information Policy," *Library Trends*, Summer 1986, pp. 19-42.

[8] Department of Education, p. 8; Barr and Associates, p. 132; Palmer and Wei, p. 10.

[9] Interview of FERPA official; *Legal Guide for Admissions Officers and Registrars* (Washington, D.C.: American Association of Collegiate Registrars and Admissions Officers, 1984).

[10] Palmer and Wei, pp. 6-7.

[11] Interview of FERPA official; Friedenberg interview.

[12] Friedenberg interview.

relationship and stating procedures by which all subsequent recurring transactions will proceed. For example, when you obtain an ATM card, you sign a document covering the relationship, and then each transaction is carried out with a password.

Considering privacy protection, it is also significant that such an electronic authorization system would not be without backup, because FERPA demands student notification of each transaction, so that the student would notice if something went wrong. Similarly, the EFT Act includes multiple extra security provisions, such as requiring a written record to be generated for the customer during each transaction (the printout generated by the ATM); a regular (usually monthly) list of all transactions; and procedures for corrections of mistakes. Similar provisions could be added to FERPA.

By the way, in any discussion of EDI, the question arises of access and fairness for students in rural or poor areas, and in fact in this regard the EFT Act does provide that at no time can it be mandatory that the customer employ electronic means for the transaction.

Given acceptance of electronic authorization, then, the scenario could work as follows: at the inception of her relationship with the institution, the student could be issued an electronic password or card, similar to an ATM number or a personal ID number for telephone registration, and all subsequent actions could be carried out by computer, including transcript requests.

What about system security and liability?

Finally, and perhaps most tangibly important for the institution itself, assuming that electronics are used both for authorization by means of password and for the transmission itself, the question remains, is the system itself, the data in transit, secure? And at what level will the institution have to prove its security or face liability?

Oddly enough for a piece of legislation concerned with protecting privacy, FERPA nowhere explicitly stipulates the duties of the institution to ensure the minimum inherent security of the data storage and transmission system itself (presently the filing cabinet and federal mail system). Rather, the legislators seem to have left this merely to be implied.

This void in the legislation is beginning to seem a bigger problem. First, there is very scant enforcement even under the current paper system. For example, currently registrars never take the time, and indeed could not take the time, to verify every signature they receive on mailed transcript requests. Also, with the increasing use of facsimile (fax) machine requests, there is document distortion and signature distortion by such means.[13] If we accept payment by VISA card number, how do we know who is sending us this number? What if someone's password is stolen?

These kinds of questions are gaining increasing attention. According to a FERPA official, these issues are of currently heated debate in the use of EDI for student loans and financial aid.

As we move toward EDI, indeed, the means seem less secure. Several writers address the vulnerability of EDI. For example, Willis Ware is concerned about "hackers" obtaining data:

> Between the outreach of remotely provided computing services and the interconnectivity of modern day networking, the educational community finds itself in an ever increasing posture of exposure and subject to an increasing scope of threats: fraud, hacking, pirating of information, stealing of computer resources, destruction of records, invasions of privacy, physical damage to facilities ...[14]

And Curran says,

> Many computer systems presently in use do not sufficiently protect the privacy concerns required in Buckley and other privacy laws. Courts have made it clear that efforts to blame the computer will fall on deaf ears. [The threat is] risk of deliberate tampering.[15]

Further, Goode and Johnson note the possibility of accidental diversion of data across lines, simply because of glitches in the system.[16]

"...under FERPA and under future EDI rulings it will be an important issue as to what constitutes 'enough' or 'reasonable' measures for the institution to protect EDI transmissions against hacking and privacy invasions."

Perhaps most significantly, the courts too have recognized this danger. For example, in the court's ruling in *Wachter v. Denver National Bank,*[l] the U.S. District Court, applying the EFT Act, stated that because electronic transmission was new, expanded legislation had become necessary to "alleviate concern" and to "enumerate rights and responsibilities." The court further said that the EFT Act was meant to protect customers, in light of the idea that automated systems are "more vulnerable to fraud and unauthorized use" than traditional methods. These same concerns would seem to be relevant now in the situation of EDI of student records.

Indeed, under FERPA and under future EDI rulings it will be an important issue as to what constitutes "enough" or "reasonable" measures for the institution to protect EDI transmissions against hacking and privacy invasions.[17] The EFT Act of 1978 requires that banks take "reasonable care" to prevent breach of security, and makes them liable for not guarding against forgery.

Such liability was upheld in the case of *Bradford Trust Co. v. Texas American Bank,*[m] where the court ruled under an application of the Consumer Credit and Protection Act[n] that a bank was liable for failure to follow its own "internal

[13] Ibid.

[14] Willis H. Ware, "Information Systems, Security, and Privacy," *EDUCOM Bulletin*, Summer 1984, p. 7.

[15] Curran, p.17.

[16] Goode and Johnson, p. 61.

[17] Friedenberg interview; interview of FERPA official; Palmer and Wei, p. 9.

procedures to verify the genuineness of the request," for not investigating a forged signature, and therefore had to pay a forged order for fund transfers. Possibly schools may be similarly liable.

"Several court decisions have ruled that there is no right for individual private action and recovery of damages as a result of violation of FERPA protection."

Even as early as 1984, explicit analogy to the world of banking was being made. For instance the AACRAO *Legal Guide* refers to the use of coded passwords "such as some banks use."[18]

Some remedies are in the works. The producers of SPEEDE are currently trying to demonstrate that it can achieve not only sufficient security, but even greater security than is currently to be had under paper postal transmission. AACRAO has set up elaborate security elements in their X.12 transmission protocol, for example bits of data stating where each transmission originated, its intended destination, how many bytes long it is, what's included in it, and acknowledgement of receipt. (Note that very few of these kinds of security reinforcements are used at all under the current paper mail system.)[19]

Another security check will be the school's complete records of transactions, as currently required under FERPA(b)(4), and as required for banks under the Bank Secrecy Act of 1970.[o] Curran also recommends several additional measures, for example ensuring the secrecy of passwords, limited access, and off-campus data storage.[20]

Could EDI FERPA violations be litigated?

The only remedy that FERPA itself provides for violations is the withdrawal of federal funding. According to the courts' interpretation, in order to be punishable such violations must be on a systematic, not an individual, basis, and must be handled via administrative procedures by the FERPA Office in the Department of Education. Said the U.S. District Court in *Smith v. Duquesne University*:[p] "[I]t is clear that FERPA was adopted to address systematic, not individual, violations of students' privacy ... to stem the growing policy of many institutions to carelessly release student records."

Curran, however, points out that no institution has ever been penalized with loss of federal funding; rather, under finding of a violation the Department of Education merely brings the offending institution into future compliance. He does, however, suggest the possibility of individual suit under tort law.[21] Further, some courts have found that there may be cause for private relief under application of Section 1983.

Several court decisions have ruled that there is no right for individual private action and recovery of damages as a result of violation of FERPA protection. The courts' reasoning here is based on the absence of any allowance for private action in FERPA itself, and on similar court precedents related to other similar federal legislation.[22]

Further, as Curran points out, there is no private right to action because the right to privacy is not a right recognized by the federal Constitution. The U.S. Constitution never mentions the word "privacy." However, Curran notes that the individual's right to privacy is hinted elsewhere in the Constitution, which "speaks of other privacy-related rights—the right to be free from unreasonable searches and seizures, and the basic right of liberty protected by the due process clauses of the fifth and fourteenth amendments."[23]

On the other hand, one of the more important cases to date on this point, *Porten v. University of San Francisco*,[h] does seem to leave the door open for private suit under at least two possible scenarios:

(1) The court seemed to imply that there would be a possibility for private suit based on tortious invasion of privacy, if the unauthorized disclosure were "to the public in general or to a large number of persons," rather than on a more limited scope.

(2) The court in Porten acknowledged that where the state constitution provides the explicit right to privacy, such a right becomes "inalienable," "self-executing," and "confers a judicial right of action on all [citizens]."

Again, should there be future FERPA legislation modeled on banking regulations, the institution may be required to ensure "reasonable care" in establishing security of records, and be liable for failures, as banks are under the Bank Secrecy Act, and for example, *Bradford v. Texas American Bank*.

And lastly, as regards any "hackers" who may perpetrate the illegal interception of transmissions, there may be penalties for them. For example, the Electronic Communication Privacy Act of 1986[q] covers the illegal interception of transmissions, by phone, TV, or computer, with civil and criminal penalties up to a $10,000 fine.

The Future of FERPA and EDI

The possibility is that we will need amendments to FERPA to address the new technology. According to Curran, "Unfortunately, the new regulations ... of 1988 do not address the issues of computer records ... Buckley needs an electronic overhaul to bring it into compliance with modern electronic systems."[24] In addition, certainly case law interpretations will emerge construing FERPA in the context of EDI.

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[18] *Legal Guide*, p. 71; interview of AACRAO official; interview of FERPA official.

[19] Interview of FERPA official; Palmer and Wei, p. 10; interview of AACRAO official; DOE, p. 7.

[20] Curran, p. 18.

[21] Ibid., p. 15.

[22] Johnson, pp. 263-66.

[23] Curran, p.14.

[24] Ibid., p.18.

[25] Daly, p. 99.

[26] Benn R. Konsynski, "Strategic Control in the Extended Enterprise," *IBM Systems Journal* 32 (March 1993): 111-142; Friedenberg interview; Palmer and Wei, p. 12.

Interestingly, at least one constitutional law expert has actually suggested a federal Constitutional amendment to extend all current individual protections into the new world of technology. Laurence Tribe proposes a "high-tech" amendment to provide "constitutional protections construed without regard to medium."[25]

As for future scenarios, there has been some speculation about the possible national societal implications of EDI. Among its ramifications might be the de facto formation of a quasi-national "universal university." As institutions increasingly communicate using a standardizing network, it is logical to suspect that their respective internal operations may also tend to become standardized. Such a "universal university" system could be heavily dominated by the large public universities, and may "swallow" smaller private institutions, who would be unable to compete with resources, and whose market identity differentiation could become less feasible.[26]

In fact, these possibilities and other scenarios like them were the concern of the EFT legislators. Part of the EFT Act created a body to further investigate and report back to the legislature concerning possible impacts of EFT on the smaller banks, on competition within banking, and on access by those of low income. All of these concerns have their equivalents in the area of EDI in student records, and may well be a focus of concern in the future.

Code and Legal References:

[a] *U.S. Code,* vol. 20, sec. 1232g (1988)

[b] *U.S. Code,* vol. 5, sec. 552 (1988); *Bowie v. Evanston,* 538 N.E.2d. 553 (Ill. 1989)

[c] *Zaal v. State of Maryland,* 602 A.2d. 1247 (Md. 1992)

[d] *Bowie v. Evanston; Kryston v. Board of Education, East Rampo Central School District,* 430 N.Y.S.2d. 688 (App. Div. 2nd Dept. 1980)

[e] *Naglak v. Pennsylvania State University,* 133 F.R.D. 18 (M.D. Pa. 1990)

[f] *Brent v. Paquette,* 132 N.H. 415, 567 A.2d. 976 (1989)

[g] *Krebs v. Rutgers University,* 797 F.Supp. 1246 (D.N.J. 1992)

[h] *Tombrello v. USX Corporation,* 763 F.Supp. 541 (N.D.Ala. 1991); *Porten v. University of San Francisco,* 134 Cal.Rptr. 839 (Cal.App.3d 1976)

[i] *Arkansas Gazette Co. v. Southern State College,* 620 S.W.2d. 258 (Ark. 1981)

[j] *U.S. Code,* vol. 5, sec. 552a (1988)

[k] EFT Act, *U.S. Code,* vol. 15, secs. 1693 et seq. (1988)

[l] 751 F.Supp. 906 (D.Colo. 1990)

[m] 790 F.2d. 407 (5th Cir. 1986)

[n] *U.S. Code,* vol. 15, secs. 1601 et seq. (1988)

[o] *U.S. Code,* vol. 12, secs. 1951 et seq. (1988)

[p] 612 F.Supp. 72 (D.C.Pa. 1985)

[q] *U.S. Code,* vol. 18, secs. 1367,2232,2510 et seq., 2701 et seq.,3117,3121 et seq. (1988)

C/E

Privacy of Student Information in a Networked Information Environment: Beyond FERPA and EDI

With the proliferation of campus connectivity to the Internet and networking of information, many questions are arising related to the privacy of student information:

- Can rosters of students enrolled in classes be posted on the World Wide Web?
- Is our institution liable for a violation of privacy that occurs because of information posted on a student's Web page when we have no policy regarding what students may post?
- Which administrators should have access to which data?
- Can student photos be posted to an electronic directory?
- What does "secure" mean in an Internet environment?
- Can we use e-mail to deliver student course and billing information?
- Given that some listserv software can be queried to determine who the subscribers are, is this a violation of FERPA protections for "academic records"?

CAUSE, in cooperation with the American Association of Collegiate Registrars and Admissions Officers, has created a task force to develop a white paper that will provide guidelines to help colleges and universities create or refine policies and processes related to the collection, use, maintenance, and disclosure of personal information of students in an increasingly networked environment. These guidelines will evolve through a thorough review of applicable state and federal laws, emerging legal questions, current campus incidents, relevant literature, and existing campus policies, and through an understanding of the concerns of stakeholders such as bursars, admissions officers, financial aid officers, and registrars. The paper will articulate the continuum of values that influence the creation of policy, and take into account the advances and implications of the technology that raises these issues.

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Commentary

INACCURATE AND MISLEADING: STUDENT HEARING RIGHTS UNDER FERPA*

Thomas R. Baker, J.D., M.A.**

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Jonathan Lewin, a student dismissed from The Medical College of Hampton Roads[1] on academic grounds, sued the Medical College and several college officials in federal court in 1995.[2] He claimed, among other things, that he was entitled to a formal hearing under the Family Educational Rights and Privacy Act of 1974[3] (FERPA) to resolve an issue that arose during the course of his academic review. In a case of first impression, the Eastern Virginia District Court broadly interpreted FERPA's provisions with significant import on the management of education records. Seven months following its initial ruling, the district court dismissed Lewin's FERPA claim when the particular circumstances surrounding a pharmacology exam came to light.

Under FERPA, public and private schools that receive federal funds -- K-12 as well as postsecondary -- must provide a formal hearing to parents and eligible students, upon request, if information in a student's education record is believed to be inaccurate or misleading. The *Lewin* court's unpredictable turn-around presents an opportunity to evaluate the governing rights to a statutory hearing provision designed to ensure that information recorded on official school documents is consistent with information recorded on unofficial documents. The extent to which the FERPA hearing rights provision complements or duplicates existing student constitutional hearing rights will also be considered.

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 114 *Ed.Law Rep.* [721] (Feb. 5, 1997).

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Federal regulations provide a right to attorney assistance during a FERPA hearing. The fact that the *Lewin* court entertained the FERPA hearing rights question itself represents a radical innovation in the context of litigation over academic dismissals.[4] In *Lewin*, the shortcomings in the student's academic record were likened to the facts of the famous 1978 case, *Board of Curators of the University of Missouri v. Horowitz*,[5] which presented the Supreme Court with a complex combination of academic and quasi-academic procedural issues. The Eastern Virginia district court, citing *Horowitz*, dismissed the student-plaintiff's due process cause of action but initially sustained his FERPA cause of action. Although the Medical College had provided the student with constitutional due process, the district court ruled that the statute required a disinterested hearing officer to determine whether school officials made an error while scoring the plaintiff's pharmacology test, a setback for the unsuspecting medical school defendant.

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[1] The Medical College of Hampton Roads is also known as Eastern Virginia Medical School.

[2] *Lewin v. Medical College of Hampton Roads*, 910 F.Supp. 1161 [106 *Ed.Law Rep.* [581]] (E.D.Va.1996); 931 F.Supp. 443 [111 *Ed.Law Rep.* [783]] (E.D.Va.1996).

[3] 20 U.S.C. § 1232g.

There has been limited litigation interpreting FERPA. The statute itself does not authorize individuals to sue educational institutions that fail to comply with its requirements.[6] The *Lewin* court was not the first to permit a student to bring a FERPA cause of action under Section 1983 of the Civil Rights Act of 1871.[7] However, no previous plaintiff had succeeded in convincing a court to recognize a student's FERPA hearing right. Indeed, two prior federal appellate decisions, *Tarka v. Cunningham*[8] and *Adatsi v. Mathur*,[9] each ruled that the student-plaintiff's allegations did not trigger a FERPA hearing right.

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[4] L.B. Helms & C.M. Helms, "Forty Years of Litigation Involving Medical Students and Their Education: I. General Education Issues," 66 *Academic Medicine* 1 (1991). *See also* D.L. Ford & J.L. Strope, "Judicial Responses to Adverse Academic Decisions Affecting Public Postsecondary Institution Students since '*Horowitz*' and '*Ewing*'" 110 *Ed.Law Rep.* [517] (Aug. 22, 1996). Many of the lawsuits analyzed by Ford & Strobe were filed by former medical students.

[5] 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

[6] For a history of court decisions affecting private rights of action under FERPA, see T.M. Johnson, "Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974," 79 *Ed.Law Rep.* [1] (Feb. 11, 1993) and R.D. Mawdsley, "Litigation Involving FERPA," 110 *Ed.Law Rep.* [897] (September 5, 1996). In recent months, at least one FERPA suit brought under § 1983 has been summarily dismissed on lack of remedy grounds. *Gundlach v. Reinstein*, 924 F.Supp. 684 [109 *Ed.Law Rep.* [1194]] (E.D.Pa.1996). Contra, *Doe By and Through Doe v. Knox County Bd. of Educ.*, 918 F.Supp. 181 [108 *Ed.Law Rep.* [134]] (E.D.Ky.1996).

[7] 42 U.S.C. § 1983. In order to raise his FERPA claim in federal court, Lewin named institutional officers as co-defendants and brought a § 1983 cause of action against them. Under the Civil Rights Act of 1871, school officials acting under color of state law may be held liable for actions which deprive a student of rights secured by federal law. Since § 1983 applies only to public officials, private school officials who violate FERPA are immune to a lawsuit brought under this cause of action. *See Odom v. Columbia University*, 906 F.Supp. 188 [105 *Ed.Law Rep.* [491]] (S.D.N.Y.1995).

Despite the Lewin court's interpretation of the FERPA hearing rights provision, a revolution does not loom on the horizon. FERPA's legislative history and the facts of Lewin confirm that a disagreement over a student's academic performance or an allegation of wrongdoing does not trigger a FERPA hearing right. To be entitled to a formal hearing, a student must allege a ministerial record-keeping error. In the event that a record-keeping error is alleged, moreover, the scope of the FERPA hearing need only consider the narrow question of whether a pre-determined grade or disciplinary sanction was correctly recorded in the student's official file.

FERPA: THE LEGACY OF THE 1970s

The FERPA hearing provision at issue in *Lewin* was enacted in 1974. It has remained a part of the United States Code without further amendment. Subsection (a)(2) of 20 U.S.C. § 1232g reads:

> No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary [of Education], to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.[10]

The author[11] of the original version of FERPA apparently derived the key terms in subsection (a)(2) from three different sources. From a 1974 book published by The National Committee For Citizens in Education (NCCE) came "inaccurate" and "misleading," the all-important hearing-triggering terms.[12] The NCCE, in articulating its concerns about student privacy, had declared that a "[p]arent and student should have the right to contest, correct, or expunge the record of material viewed by them as incorrect, misleading or harmful."[13] Meanwhile, the statutory phrase "challenge the content" of education records echoes language in a book of recommended guidelines drafted by a conference of education scholars convened by the Russell Sage Foundation in 1969.[14] The phrase "otherwise in violation of the privacy or other rights of students" presumably referred to an emerging line of constitutional case law that held that the inclusion of irrelevant but highly stigmatizing personal data in a student's file -- even if it was true -- violated the student's right to privacy.[15]

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[8] 917 F.2d 890 [63 *Ed.Law Rep.* [746]] (5th Cir.1990).

[9] 935 F.2d 272, 1991 WL 105765 (7th Cir. (Ill.)).

[10] 120 *Cong.Rec.* S.39864 (December 13, 1974).

[11] FERPA was drafted by John Kwapisz, an aide to Senator Buckley. Note, "The Buckley Amendment: Opening School Files For Student and Parental Review." 24 *Catholic University Law Review* 588, 598 (1975).

Congress took the unusual step of amending the statute four months after President Ford signed the original version of the bill into law. FERPA had been drafted without the benefit of committee hearings, and even FERPA supporters admitted the bill was "written in haste."[16] In December 1974 Congress amended several provisions of FERPA, including subsection (a)(2). These amendments neither addressed nor clarified the scope of student hearing rights. The floor debate in Congress offered virtually no guidance as to the practical application of subsection (a)(2).

Litigants in court have claimed that FERPA entitled students to a hearing to challenge the substance of academic and administrative decisions. However, there is no evidence that members of Congress discussed the broad range of school decisions that might give rise to a hearing request. Congressman Kemp and Senator Buckley, sponsors of the original bill, were primarily concerned about school officials who systematically gathered intimate details about students and retained such records in perpetuity.[17] Comments by Kemp and Buckley indicated that fears about the long-term stigma of adverse information, rather than incorrect determinations of guilt in misconduct cases, provided the momentum behind the education privacy rights movement in the early 1970's.[18] During the same year it enacted FERPA, Congress amended the Administrative Procedures Act to protect the privacy interests of individuals whose educational, financial, medical, criminal, or employment records were on file with a federal agency. Some parallelism in the two statutes is evident. Whereas FERPA prohibited school officials from releasing personally identifiable information on students, the Privacy Act of 1974[19] generally prohibited federal agents from disclosing personal information in its files and required that agencies correct inaccurate personal information.

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[12] J. William Rioux & Stuart A. Sandow, *Children, Parents, and School Records* (The National Committee For Citizens in Education, 1970). Senator Buckley cited this work during his speech in support of the original amendment. 120 *Cong.Rec.* 14580 (May 14, 1974).

[13] Rioux & Sandow, *Children, Parents, and School Records*, Recommendation 8, at 15.

[14] Russell Sage Foundation, *Guidelines for the Collection, Maintenance & Dissemination of Pupil Records* (1970). Guideline 3.3 states that "[f]ormal procedures should be established whereby a student or his parents might challenge the validity of any of the information contained in [designated student education records]." Senator Buckley cited this work during his speech in support of the original amendment. 120 *Cong.Rec.* 14581-82 (May 14, 1974).

[15] The argument in favor of a constitutional right to private school records was outlined in Sarah C. Carey's law review article "Students, Parents, and the School Record Prison: A Legal Strategy for Preventing Abuse." In presenting her case, Carey relied primarily upon *Merriken v. Cressman*, 364 F.Supp. 913 (E.D.Pa.1973), from which Senator Buckley quoted when he presented his bill. 120 *Cong.Rec.* 14581 (May 14, 1974). Prior to the passage of FERPA, Carey's article was printed in the NCCE's *Children, Parents, and School Records*, and the final version appeared in 3 *Journal of Law & Education* 365 (July, 1974).

[16] Quote from Senator McIntyre, 120 *Cong.Rec.* 39858 (December 13, 1974).

Evidence from the Congressional Record emphasized the harm that FERPA is designed to prevent. But it failed to detail the remedy anticipated by FERPA. During Congressional discussion of the proposed student privacy law, some expressed concerns about the veracity of student record information maintained by school officials. For instance, Senator Buckley recounted an anecdote in which a principal had allegedly prohibited a junior high student from attending graduation ceremonies on the ground that she was a "bad citizen." "When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records," reasoned the New York Senator. "Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student."[20]

At the time FERPA was introduced, the Supreme Court had not yet ruled as to whether the Due Process Clause of the Constitution provided public students with hearing rights in suspension cases. Lower courts that had considered the question, however, had decided in favor of student hearing rights.[21] Nothing said during the Congressional debate over the proposal demonstrated that either Senator Buckley or his colleagues believed that students were being improperly suspended from school for sub-par academic performance or for non- academic misconduct without due process. Instead, most of the debate over Buckley's original amendment focused on subsection (b), an unrelated provision designed to prohibit student surveys without parental permission and restrict invasive new teaching methods, among other things. Subsection (b) was eventually deleted.

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[17] Comment, "Protecting the Privacy of School Children and Their Families Through the Family Educational Rights and Privacy Act of 1974," 14 *J. of Family Law* 255, 270-276 (1975). *See also* Steven N. Schatken, "Student Records at Institutions of Postsecondary Education: Selected Issues Under the Family Educational Rights and Privacy Act of 1974," 4 *J. of College & University Law* 147 (1977); Note, "A Student Right of Privacy: The Developing School Records Controversy," 6 *Loyola University Law Journal* 430 at 437 (1975); Note, "Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974," 61 *Iowa Law Review* 74 (1975); Note, "The Buckley Amendment: Opening School Files For Student and Parental Review," 24 *Catholic University Law Review* 588, 598 (1975); Katherine Cudlipp, "The Family Educational Rights and Privacy Act Two Years Later," 11 *U. of Richmond Law Review* 33 (1976); and Merle S. McClung, "Student Records: The Family Educational Rights and Privacy Act of 1974," 22 Inequality in Education 5 (July, 1977).

[18] *See* Comment, Notes, and law review articles *supra* note 16.

[19] 5 U.S.C. § 552a

[20] 120 *Cong.Rec.* 14580 (May 14, 1974).

Subsection (a)(2), the lone provision dealing with hearing procedures, was practically ignored during debate. At no point did the members of the Senate argue over the likely impact of subsection (a)(2) upon private schools, for instance, or the need for a formal hearing in college academic dismissal cases.[22] FERPA's sponsors eventually offered an official clarification of the bill's hearing provision, but the explanation came only after school officials questioned the scope of the law and Congressional leaders agreed to consider amending it.

On December 13, 1974, in support of their proposal to amend the law signed by President Ford, Senator Buckley and Senator Pell submitted a written explanation of FERPA, a document usually referred to as the "joint statement."[23] In regard to hearing rights under the statute, the joint statement explained that subsection (a)(2) of the original bill "raised a number of questions which these amendments seek to answer -- 1) who has the right to challenge, 2) what records are covered, and 3) what sort of proceeding should be undertaken."[24] Printed in the *Congressional Record* at a time when no committee hearings had been held and no other document existed that spelled out the intentions of FERPA's sponsors, the joint statement has become important to judges forced to interpret the statute.[25]

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[21] FERPA was passed one year before *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), the Supreme Court's landmark high school due process case. Prior to *Goss*, one federal appellate court and several district courts had ruled that students attending state-supported schools could not be expelled without a hearing and an opportunity to challenge the accusations. See Carey, "Students, Parents, and the School Record Prison," pp. 381-385.

[22] 120 *Cong.Rec*. 14579-14595 (May 14, 1974). One law review author, commenting on the lack of discussion in Congress over the sections of the bill which were later enacted into law, noted that "nowhere in the debate was the effect of the amendments on university administrations explored, yet this appears to be the area of greatest controversy." Comment, "Protecting the Privacy of School Children and Their Families Through the Family Educational Rights and Privacy Act of 1974," 14 *J. of Family Law* at 276.

[23] Joint Statement in Explanation of Buckley/Pell Amendment, 120 *Cong.Rec*. 39862-63 (December 13, 1974).

[24] *Id.*

[25] E.g., *Tarka v. Franklin*, 891 F.2d 102 [57 *Ed.Law Rep.* [743]] (5th Cir.1989) and *Tarka v. Cunningham, supra*, as well as *Lewin v. Medical College of Hampton Roads*.

The joint statement addressed the hearing issue head-on. FERPA was not designed "to burden schools with onerous hearing procedures."[26] Senators Buckley and Pell explained:

> The amendment is intended to require educational agencies and institutions to conform to fair information record-keeping practices. It is not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution. It is intended, however, to open the bases on which decisions are made to more scrutiny by the students, or their parents about whom decisions are being made, and to give them the opportunity to challenge and to correct -- or at least enter an explanatory statement -- inaccurate, misleading, or inappropriate information about them which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution.[27]

As to the practical meaning of "inaccurate or misleading information," Senators Buckley and Pell explicitly refuted by example the suggestion that a student could contest a grade given in class at a FERPA hearing:

> ... It [FERPA] is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to correct an improperly recorded grade but could not through the hearing required pursuant to this law contest whether the teacher should have assigned a higher grade...[28]

These passages in the joint statement dramatically demonstrated the narrow scope of hearing rights intended by FERPA's sponsors. A disagreement over allegations of wrongdoing did not trigger a FERPA hearing right. The new law clearly was not designed to supplant constitutional due process protections already in place, but, instead, to provide to students attending public school limited procedural opportunities that were not necessarily recognized under constitutional law. And in the private educational sector--outside the jurisdiction of the Fourteenth Amendment -- FERPA instituted basic record-keeping rights where no mandatory procedures existed. It was therefore vitally important that the precise meaning of the statutory language be readily understood.

Although the proposed December amendments passed without dissent, many of the practical problems that FERPA presented to school officials were left unresolved. The terms "inaccurate" and "misleading," which appeared in the original version of the law, were neither deleted nor clarified. Instead, Congress simply retained the fundamental terminology of subsection (a)(2) in the final version without further delineation as to its intended scope.[29] As a result, not only did the statute include such imprecise terms "inaccurate" and "misleading" but the third basis for a hearing remained an open invitation to misinterpretation. The amended version of FERPA still provided a student hearing right to challenge the content of education records where the information on record was "otherwise in violation of [his or her] privacy rights or other rights."

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[26] 120 *Cong.Rec.* 39862 (December 13, 1974).

[27] *Id.*

[28] *Id.*

A judge looking only at the statutory language might be persuaded to apply FERPA beyond the scope of the sponsor's intentions.[30] Nothing in the statute explicitly precludes an attorney[31] from exhausting the school's existing grievance procedures and then requesting a FERPA hearing in hopes of relitigating the merits of the school's case under the guise of clearing up "inaccurate" or "misleading" information in the student's file.[32] Alternatively, an attorney might demand FERPA-type hearing procedures during a non-academic suspension or an academic dismissal on the ground that the student's "other rights" were at stake. Even if school officials responded to such arguments by bringing the joint statement to the attention of the court, the statute might still be misapplied. The joint statement was silent as to the intended meaning of "privacy rights or other rights." As for the meaning of "inaccurate" or "misleading," the joint statement offered only the example of a decision to assign a grade. Rather than set forth a more comprehensive statement as to the scope of hearing rights, Senators Buckley and Pell simply resolved the grade challenge issue and ignored situations where a parent or student dissatisfied with a school policy or practice might be tempted to request a FERPA hearing under the guise of challenging the accuracy of information recorded in educational files.

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[29] In its original form, this provision of the law provided that "parents shall have an opportunity for a hearing to challenge the content of their child's school records to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein." 120 *Cong.Rec.* 14579 (May 14, 1974). To the original version of subsection (a)(2) the Senate added verbiage in December, 1974 which (1) insured that a student would have an opportunity to place in his or her file a written explanation and (2) authorized the executive branch to promulgate hearing procedures. Pub.L. 93-568, *U.S. Code Cong. & Ad.News*, 93 Cong., 2d Sess. 6795.

[30] At least one commentator expected considerable litigation over the scope of FERPA hearing rights to challenge inaccurate or misleading information. Note, "Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974," 61 *Iowa Law Review* 74 (1975). The University of Iowa law student who authored this Note wrote that "only a body of institutional, administrative, and judicial decisions will resolve the issue of what is 'misleading' or 'inappropriate' record information." *Id.* at 106. Although this law student apparently overlooked the significance of the limiting language in the Buckley/Pell Joint Statement, other legal researchers did not fail to construe the intent of subsection (a)(2). For instance, law student Michael Zdeb wrote the "Legislative history indicates that the right to challenge the accuracy of records generally refers to accuracy of the recordation and not to a substantive challenge." Note, "A Student Right of Privacy: The Developing School Records Controversy," 6 *Loyola University Law Journal* 430 at 437 (1975).

[31] A zealous lawyer representing an accused student would presumably be attracted by the prospect of a FERPA hearing since many schools do not provide a disinterested hearing officer in their internal judicial procedures or permit attorney representation, even at the postsecondary level. *See* M. Dannells, "Changes in disciplinary policies and practices over 10 years," 31 *J. of College Student Development* 408 (1990). Private schools, not bound by the Fourteenth Amendment, typically offer students accused of misconduct fewer procedural protections than public schools. Thus, an accused student's attorney might well view a FERPA hearing as an ideal forum -- or at least a more desirable forum -- in which to dispute the school's allegations of misconduct if permitted to do so by the hearing adjudicator.

THE RESPONSE OF THE DEPARTMENT OF EDUCATION

To facilitate nationwide compliance with the provisions of FERPA, the U.S. Department of Education created a sub-department, the Family Policy Compliance Office,[33] in the mid-1970's.[34] Final regulations developed by the department were published in 1980.[35] Armed with the authority to threaten a school's monetary resources,[36] the Department of Education went to considerable lengths in spelling out the procedures to be provided by school officials at FERPA hearings. When a student requests a FERPA hearing[37] and the request is consistent with the intended scope of the statute, the final regulations required that school officials notify the student -- and parents of a K-12 student -- of the hearing date, place, and time "reasonably in advance of the hearing."[38] During the hearing,[39] the parent or student must be afforded "a full and fair opportunity to present evidence relevant to the issues raised" and be "assisted or represented" by an advisor, including an attorney, of his or her choice at his or her own expense.[40] The hearing adjudicator must issue a written decision within a reasonable time period after the hearing[41] based "solely upon the evidence presented at the hearing" and include "a summary of the evidence and reasons for the decision."[42]

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[32] Shortly after FERPA became effective, several researchers commented about the subjective nature of the words inaccurate and misleading. E.g., Schatken, "Student Records," at 167. Even experts have been known to confuse the scope of hearing rights under FERPA. For example, two hornbook authors, after explaining that FERPA extends to parents the opportunity to challenge the accuracy of records, used FERPA-type language while summarizing the holding of the landmark 1961 decision in Dixon v. Alabama State Board of Education. The Fifth Circuit recognized in Dixon, wrote Alexander & Alexander, "that students had a due process right of access to school records and to challenge errors and inaccuracies in them." Kern Alexander & M. David Alexander, *The Law of Schools, Students, and Teachers* (St. Paul: West Publishing Co., 1984), pp. 236-237, quote at 237.

[33] 20 U.S.C. 1232g(f). 34 C.F.R. § 99.60. The Office can be contacted at:

Family Policy Compliance Office
Office of Human Resources and Administration
U.S. Department of Education
400 Maryland Ave. S.W.
Washington, D.C. 20202-4605
Telephone: (202) 732-1807

[34] Senator Buckley, responding to conservative critics of FERPA who charged that his amendment would "create too much additional work and redtape for schools and the educational bureaucracy," retorted on the floor of the Senate that he was "not so much concerned about the workload or convenience of the educational bureaucracy but, rather with the personal rights of America's children and their parents." 120 *Cong.Rec.* 14581 (May 14, 1974). Ironically, during debate over a revenue sharing proposal offered the same day he introduced his original FERPA amendment, Buckley condemned "bureaucratic redtape and regulatory shackles" at the

Selection of the adjudicator was perhaps the most controversial issue in the final regulations. Schools are required to assign an official to conduct the hearing "who does not have

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federal level and denounced the creation of new programs which spawn one new administrative unit within the government. "The high motives and obvious compassion for the needy that have been the hallmarks of our Federal education programs," noted the New York Senator in support of his revenue sharing amendment, "are often thwarted by the clumsy and often impenetrable set of rules and regulations that accompany Federal Aid." *Id.* at 14442.

[35] 45 *Fed.Reg.* 30,911 (May 9, 1980).

[36] *Id.* § 99.63-67. According to the statutory protocol, an educational institution accused of failing to conform to FERPA is itself provided a hearing before an administrative Review Board or hearing officer, which may recommend that the Secretary strip the school's federal funding privileges.

[37] The burden of requesting a hearing initially falls upon the student, but if the student asks the institution to correct a record and the institution refuses, the institution is obliged to inform the student of his or her right to a hearing. The student, once informed of this right, now has the burden of explicitly demanding a hearing. *Id.* at § 99.20-21. *See also Adatsi v. Mathur*, 1991 WL 105765 (7th Cir. (Ill.)).

[38] 45 *Fed.Reg.* 30,911 at § 99.22(a). The final regulations did not specify written or verbal notice.

[39] Educational institutions are required to hold a hearing within a "reasonable period of time" following the request. *Id.* The regulations did not set forth a minimum or maximum number of days from the date of the request.

[40] *Id.* at § 99.22(c).

[41] *Id.* at § 99.22(d).

[42] *Id.* at § 99.22(e).

a direct interest in the outcome of the hearing."[43] Educational institutions are permitted to assign as the adjudicator "any party, including an official of the educational agency" so long as he or she is not directly interested in the outcome.[44] The regulations are silent as to what constitutes a "direct interest," but presumably mere affiliation by employment does not create an irreconcilable conflict of interest.

As of August 1996 the substance of the original FERPA hearing procedures had not been amended by the Department of Education.[45] Similarly, the department's model record-keeping policy as of April 1995 only clarified one point of contention. Whereas the final regulations called for the student to be "assisted or represented" by an attorney, the model procedures left out the word "represented." Thus, educational institutions may restrict the role of an attorney who appears on behalf of a student at a FERPA hearing.[46]

While the final regulations did answer many important procedural questions, the primary issues presented by the statutory language -- the circumstances that trigger a student's right to a FERPA hearing -- were not clarified by the final regulations. The secretary, rather than refine the statutory terminology and give practical meaning to the notion of "inaccurate or misleading" information, simply repeated this phrase without delineation.[47]

In the process of responding to inquiries from school officials, parents, and students, the department's Family Policy Compliance Office has delineated the scope of "inaccurate and misleading information." When responding to specific instances, the department has interpreted subsection (a)(2) of the statute narrowly. The Family Policy Compliance Office insists that a student has right to "challenge facts that are inaccurately recorded, such as a student's name or date and place of birth, and not conclusions that have been made about a student's performance or a student's statements and opinions."[48] Citing the Buckley/Pell joint statement as evidence that FERPA was "not intended to overturn established standards and procedures," the Family Policy Compliance Office advises that "if a school denies a student's request for amendment of a record because the record is not accurate or misleading, the student does not have a right to a hearing or the right to place a statement in the record."[49]

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[43] *Id.* at § 99.22(b).

[44] *Id.*

[45] 34 C.F.R. at § 99.22. In 1988, the format of the regulations was changed but not the content of § 99.22.

[46] U.S. Department of Education, "Student Records Policies and Procedures for State University: A model for colleges and universities to use in meeting the requirements of Section 99.6 of the regulations implementing the Family Educational Rights and Privacy Act of 1974," (Revised, April 1995), p. 8. Point 4 states "The student may be assisted by one or more individuals, including an attorney."

[47] The final regulations stated that an education agency "shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students." 34 C.F.R. § 99.21(a).

The critical issue then for school officials, in deciding to grant or deny a hearing request, is whether the record at issue is an "amendable record."[50] According to the Family Policy Compliance Office, a decision by a school's disciplinary hearing panel, for instance, is not an "amendable record" and therefore cannot be grounds for a FERPA hearing.[51] On the other hand, if an inaccurate notation of a disciplinary suspension were to appear on a student's academic transcript, the transcript would presumably constitute an amendable record as far as the recording of the disciplinary suspension is concerned, and a school would be bound by FERPA to provide a hearing if a student were to challenge the transcript's notation. The scope of such a hearing would be limited, however, to the question of whether or not the transcript notation was consistent with the hearing panel's decision. The school would not be obligated to re-try the case against the student. The student could not insist, moreover, that the hearing adjudicator review the record of the disciplinary proceeding and determine whether or not the evidence presented to the hearing panel warranted the panel's decision to suspend the student.

In light of the Buckley/Pell joint statement, the department's informal "amendable records" policy appears to be consistent with the intent of FERPA. It is not, however, spelled out in the Code of Federal Regulations. Because the Code of Federal Regulations clarifies the hearing procedures to be provided once a hearing right is triggered but not the situations that give rise to a hearing right, the department may have inadvertently encouraged parents, students, and their lawyers to petition school officials for FERPA hearings to which they were not entitled. Early litigation did not explore provisions of the statute related to hearing rights.[52] As a result, questions surrounding student hearing rights were virtually ignored during the first round of legal challenges that followed the statute's enactment. Only in 1990 did *Tarka v. Cunningham* ignite litigation that weighed heavily in *Lewin v. Medical College of Hampton Roads*.

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[48] Family Policy Compliance Office, U.S. Department of Education, Washington, D.C. to Thomas R. Baker, April 9, 1996 telephone conversation.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] See T.M. Johnson, *supra* note 7. Several of the first FERPA lawsuits were dismissed by judges who held that FERPA did not grant a private right of action, and the courts did not address the scope of the statute.

Tarka v. Cunningham

Tarka v. Cunningham[53] arose at the University of Texas, where a student filed a §1983 cause of action after the college refused to grant him a FERPA hearing to contest his "C" grade in physics. Mark Tarka, a non-degree seeking student with considerable litigation experience in federal court prior to this suit,[54] complained that his physics professor had responded incompletely and "without value" to his request for summary statistical data regarding grade assignments.[55] The professor's responses "failed to satisfy" Tarka, who accused his instructor of acting "deliberately and without regard for his official duties."[56]

The federal district court dismissed *Tarka* for failure to state a claim upon which relief could be granted. "[T]here is no private cause of action under FERPA," the district judge concluded.[57] Even if the student could bring a FERPA cause of action, noted the district court, the statute "only entitles a student to know whether or not the assigned grade was recorded accurately in the students records."[58] The student appealed to the Fifth Circuit, which heard the FERPA claim on its merits.[59]

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[53] 917 F.2d 890 (5th Cir.1990).

[54] "Given pro se appellant Tarka's facility at writing and his persistence, combined with his practical litigation experience," began the opinion of Circuit Judge Jones, "he might logically have chosen to attend law school rather than to pursue a science curriculum." *Id.* at 891. This snide introduction referred to an earlier case, *Tarka v. Franklin*. Tarka, dissatisfied with the Fifth Circuit's decision in *Franklin*, appealed *Franklin* to the U.S. Supreme Court, only to have the nation's highest court deny his writ of certiorari the same year the Fifth Circuit issued *Tarka v. Cunningham*. See *Tarka v. Franklin*, 891 F.2d 102 [57 *Ed.Law Rep.* [743]] (5th Cir.1989), cert. denied, 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990).

[55] *Tarka v. Cunningham*, 917 F.2d at 892.

[56] *Id.*

[57] *Tarka v. Cunningham*, 741 F.Supp. 1281 at 1282 [62 *Ed.Law Rep.* [205]] (W.D.Tex.1990).

[58] *Id.* As for the source of the "accurate recording" rule of law for hearing requests under FERPA, the district court opinion did not contain a citation. Presumably, the source was the Buckley/Pell Joint Statement, which stated that a "student could seek to correct an improperly recorded grade" under the FERPA hearing rights provision. 120 *Cong.Rec.* 39862 (December 13, 1974).

[59] In allowing a FERPA private right of action to proceed under § 1983, the Fifth Circuit cited as precedent *Tarka v. Franklin*, 891 F.2d 102 (5th Cir.1989) and *Fay v. South Colonie Century School Dist.*, 802 F.2d 21 [35 *Ed.Law Rep.* [71]] (2nd Cir.1986). "Although [no private right of actions exists under FERPA]," wrote the Fifth Circuit, "an action under 42 U.S.C. § 1983 may nevertheless be premised on an alleged violation of FERPA rights." *Tarka v. Cunningham*, 917 F.2d at 891.

Although the *Tarka* plaintiff successfully hurdled the private right of action obstacle at the appellate level, the Fifth Circuit rejected the student's interpretation of subsection (a)(2) of FERPA. It held that the statute "[precludes] a cause of action whose purpose is to challenge, except for ministerial error, the grade assigned to a student."[60] Pointing to the Buckley/Pell joint statement as evidence of FERPA's intent, the Fifth Circuit judges ruled that a student's grade "can only be inaccurate or misleading if [it does] not reflect what the grader intended or if [it is] mathematically incorrect."[61]

Neither the court's prior opinion in *Tarka v. Franklin* nor the statute's legislative history can explain the choice of words in the Fifth Circuit's holding in *Tarka v. Cunningham*. The appellate judges went beyond the language of the joint statement and spoke of "ministerial errors," "mathematical errors," and the intentions of the grader, terms with no apparent source. Furthermore, the "amendable records" language preferred by the Department of Education was altogether absent from the Fifth Circuit's opinion. Since the plaintiff in *Tarka* conceded that his lawsuit alleged no ministerial error, the practical meaning of "ministerial error" -- the crux of the district court's holding six years later in Lewin -- was left unanswered by the Fifth Circuit.

Adatsi v. Mathur

Of the several judicial decisions that have addressed student hearing rights under FERPA, the Seventh Circuit's holding in *Adatsi v. Mathur*[62] most closely resembles the position of the Department of Education. The full text of the *Adatsi* opinion was not published.[63] It is, however, available electronically on Westlaw.

Eden Adatsi, a native of Ghana, filed suit against officials of the Southern Illinois University at Carbondale (SIU-C) after he encountered difficulties transferring to another institution in 1986. Because Adatsi owed money to SIU-C, he was apparently unable to secure a transcript that would facilitate his institutional transfer. In federal court, the student-plaintiff argued that he had been discriminated against on the basis of his race and national origin in violation of Title VI of the Civil Rights Act of 1964. He also raised two FERPA claims, one of which involved his financial aid records and another that involved the grade he received in a finance course at SIU-C. Adatsi had attended the finance course in question but was not officially registered for it. SIU-C officials eventually permitted him to take the final examination and he received a grade of "B." This did not satisfy Adatsi, who alleged that the "B" grade violated both Title VI and FERPA.

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[60] *Tarka v. Cunningham*, 917 F.2d at 891. As to the "other [privacy] rights of students" language in statute, the Fifth Circuit ruled that this general phrase does not grant to students the right to challenge a professor's grading process. The court reasoned:

> Congress could not have intended, simply by using that general phrase, to afford students a federal right, enforced by federal regulations, to challenge the teachers' or educational institutions' grading process. Such an action would effect a dramatic intrusion of federal authority into the setting of academic standards ... *Id.* at 892.

[61] *Id.* at 891. The court's opinion quoted the portion of the Joint Statement which explicitly referred to a student using FERPA to contest a grade. *Id.* at 892.

[62] 935 F.2d 272, 1991 WL 105765 (7th Cir. (Ill.)).

[63] In the *Federal Reporter*, the decision is referenced in a "Table of Decisions Without Reported Opinions." Because the opinion in *Adatsi* was not published, it cannot be cited or used as precedent in the Seventh Circuit in other cases.

The district court in Illinois dismissed Adatsi's Title VI cause of action on procedural grounds. In regard to the grade assigned in the finance course, the district court noted that the student was not challenging the accuracy of his transcript -- which showed a "B" grade -- but the propriety of the grade.[64] With no alleged record-keeping error to be found in the plaintiff's petition, the district court dismissed the FERPA claims. On appeal, the Seventh Circuit affirmed the district court's ruling in every respect.

In their unpublished opinion, the appellate judges addressed the FERPA issues raised by Adatsi without reference to *Tarka*, the joint statement, or the Department of Education. In dismissing Adatsi's financial aid record error claim, the Seventh Circuit noted that 34 C.F.R. §§ 99.20-21 obliges a student to initiate the hearing request by asking the educational institution to correct a record.[65] In regard to the grade Adatsi received in his finance course, SIU-C officials had apparently refused to hold a hearing. "Adatsi seems to feel that he deserved a grade other than 'B,'" noted the court, "and that the defendants should have given him a hearing to contest the grade."[66] Since the former student did not allege that the "B" grade assigned by his instructor was recorded inaccurately on his transcript, the court held that Adatsi's hearing request fell outside the scope of the statute. "FERPA addresses the situation where a student seeks to have misleading or inaccurate information in his records corrected," concluded the Seventh Circuit, "[but there] is nothing inaccurate about Adatsi's grade."[67]

Lewin v. Medical College of Hampton Roads, Round 1

Virginia District Court Judge Jackson found the facts of *Lewin* "strikingly similar"[68] to *Board of Curators v. Horowitz*. Jonathan Lewin was dismissed from the Medical College of

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[64] 1991 WL 105765 at 3.

[65] *Id.*, footnote 3.

[66] *Id.* at 3.

[67] *Id.*

[68] *Lewin v. Medical College of Hampton Roads* [*Lewin I*], 910 F.Supp. 1161 at 1166 [106 *Ed.Law Rep.* [581]] (E.D.Va.1996). The defendant is a state institution.

Hampton Roads following a series of contentious meetings with faculty members and the Student Progress Committee. He alleged that the committee had acted with malice, bad faith, and ill will during its review. One component of Lewin's "uneven academic record," to quote the words of Judge Jackson,[69] was his failure to pass a pharmacology exam. One more correct answer, and he would have received a passing grade. This setback did not immediately result in the suspension of Lewin, who was given a second chance by the medical college to pass the exam but required to complete another pharmacology course. On his second attempt, Lewin earned a satisfactory grade of "high pass."[70]

Following unsatisfactory performances in several of his clinical rotations, the Student Progress Committee considered whether to suspend Lewin. During the committee's review, Lewin contested many of the academic judgments made by the college during his enrollment, including the grading of his original pharmacology exam. According to the plaintiff's written pleadings, at least one of the questions on the first pharmacology exam was mistakenly scored as an incorrect response.[71] Lewin protested the scoring of the first exam prior to enrolling in the second pharmacology class, but medical college officials allegedly refused to provide Lewin a meaningful opportunity to contest his grade. When college officials eventually permitted Lewin to review his pharmacology exam,[72] the Chairman of the Pharmacology Department refused to allow him to photocopy it and threatened to destroy it.[73] Lewin also alleged that the college had denied him assistance of counsel during the committee's meetings and pre-empted his right to appeal his grades.[74]

Judge Jackson's decision in *Lewin I* came in response to a motion to dismiss by the defendant medical college. The college asserted that the plaintiff had not alleged sufficient information in his pleadings to warrant a trial on the merits of any of the various claims brought against the college.[75] In regard to Lewin's constitutional claims, Judge Jackson granted the medical college's motion to dismiss. Relying on the Supreme Court's holding in *Horowitz*, the district court ruled that the procedures provided to the medical student satisfied the notice and hearing requirements of the Fourteenth Amendment for an academic dismissal.[76] The FERPA cause of action, on the other hand, could not so easily be set aside since Lewin's complaint arguably alleged a ministerial record-keeping error. Furthermore, Lewin claimed that college officials had not provided him with the minimum procedural requirements set forth in the FERPA regulations.[77] Thus, the outcome of Lewin's FERPA claim hinged upon the question of whether the medical college was required to provide the student a FERPA-type hearing at all.[78]

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[69] *Id.* at 1167.

[70] Lewin had initially attempted to satisfy the pharmacology requirement by completing a pharmacology course at another institution. However, the Medical College would not accept his grade from the other institution as a fulfillment of its requirements unless he passed a pharmacology exam prepared by the Medical College. *Id.* at 1166.

[71] *Id.* at 1170.

[72] The Medical College allegedly refused Lewin access to his pharmacology examination until advised by the Department of Education of his statutory right to review it.

[73] *Id.* at 1168. The pleadings also speak of a failed examination in internal medicine, but the district court's decision referred only to the pharmacology exam. According to his pleadings, Lewin transposed his answers from the test booklet to the answer sheet during the internal medicine examination. *Id.*

[74] *Id.* at 1169.

Lewin's cause of action was without precedent in the case law in so far as Judge Jackson understood the allegations. Both *Tarka* and *Adatsi* claimed to deserve a higher grade but neither plaintiff had specifically alleged that school officials marked correct answers as incorrect. Judge Jackson, pointing to the plaintiff's allegations over the scoring of his first pharmacology exam, held in *Lewin I* that the plaintiff's FERPA claim alleged a ministerial record-keeping error.[79]

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[75] In addition to the FERPA cause of action, Lewin asserted that Medical College officials had violated his constitutional right to due process, violated his rights under the Rehabilitation Act of 1973, defamed him, and breached its contract with him.

[76] *Id.* at 1167. Judge Jackson required only that the Medical College make the student aware of his academic deficiencies and the reason for the Committee's review of it, and give him an opportunity to address the contents of his academic record before the Committee. In so doing, the court appears to have followed the post-*Horowitz* trend in judicial behavior. *See* Ford & Strope, "Judicial Responses to Adverse Academic Decisions Affecting Public Postsecondary Institution Students since '*Horowitz*' and '*Ewing*,'" *supra* note 1.

[77] If Lewin was entitled to a FERPA hearing, Judge Jackson ruled that the Medical College, in order to satisfy the FERPA regulations, was obliged to provide a disinterested hearing officer, an opportunity for the student to be assisted by counsel, and other hearing rights established in the FERPA regulations. Lewin had requested a FERPA hearing, he alleged, but college officials refused to grant his request on the ground that the Committee's proceedings satisfied the FERPA regulations. *Id.* at 1169.

[78] *Id.* In rejecting defendant's argument that FERPA provides no private right of action, the court cited *Fay v. South Colonie Central School Dist.* as well as *Tarka v. Cunningham*. As to Lewin's other causes of action, the court summarily dismissed his § 504/ADA claim but refused to dismiss the state law contract claim and the defamation cause of action.

[79] In so reasoning, Judge Jackson wrote:

> ... Regarding the grade on the Pharmacology examination, the First Amended Complaint alleges that officials and employees of the Medical College had reason to know that there may have existed various scoring inaccuracies ... The language employed by the Plaintiff in the complaint does not necessarily imply that his

Since Lewin might have been entitled to a FERPA hearing to determine whether one or more correct answers on his exam were mistakenly scored as incorrect answers, the court refused to dismiss the FERPA cause of action. Lewin's case proceeded to trial before Judge Rebecca Beach Smith.

Lewin v. Medical College of Hampton Roads, Round 2

Lewin's case never reached trial. The pharmacology exam that Lewin failed by a small margin became the focal point of the second bench decision. It consisted of 158 multiple-choice questions, including Question 52 (Which of the following diuretics is most appropriate for treatment of congestive heart failure?) and Question 104 (Which of the following statements [regarding the effect of certain chemicals on the various sites on a nerve cell] is INCORRECT?).[80] After a copy of the exam was made available to the district court, Judge Smith ruled on the medical college's request for summary judgment and issued a written decision on the merits of Lewin's FERPA claim.[81]

The court's ruling in *Lewin II*[82] acknowledged the issues of law resolved by Judge Jackson in *Lewin I* and the need for a trial if the evidence supported a conclusion that a ministerial record-keeping error had occurred. Unfortunately for the plaintiff, the discovery of the multiple-choice exam exposed the true nature of the grading controversy. With the disputed pharmacology exam before the bench, Lewin did not argue that answers scored as incorrect by the college appeared on the master answer key as correct answers, as Judge Jackson had inferred from Lewin's original pleadings. Instead, Lewin contended that Questions 52 and 104 were ambiguous or may have more than one correct answer. He claimed that his responses were correct when weighed against course materials and a subsequent exam.[83] Thus, Lewin's

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> challenge stands outside the scope of FERPA. Rather, the complaint alleges that for at least one of the questions on the examination which Plaintiff correctly answered, the answer was mistakenly scored as an incorrect response ... Reference to this alleged scoring error suggests that Plaintiff's challenge falls squarely within the bounds of FERPA. Cf. *Tarka*, 917 F.2d at 891-92 (finding that because student alleged no ministerial error in his grade, FERPA did not allow challenge). 910 F.Supp. at 1170.

[80] *Lewin v. Medical College of Hampton Roads* [*Lewin II*], 931 F.Supp. 443, 445-446 (E.D. Va 1996).

[81] David K. Sutelan, Counsel for the Medical College, to Thomas R. Baker, September 30, 1996 telephone conversation.

[82] 931 F.Supp. 443.

[83] As for Question 52, the graders believed the correct answer was C but Lewin had marked Answer E, which he believed could be verified as the correct answer by reference to course materials and a subsequent exam. Lewin had marked Answer C for Question 104, which asked

argument was not altogether different from the plaintiffs' claims in *Tarka* and *Adatsi*.

This evidence led to dismissal of the FERPA claim since the "alleged inaccuracy" did "not relate to a technical, ministerial, or mathematical mistake in the grading of the exam."[84] Judge Smith noted that "Lewin seeks to have a federal jury decide whether 'Furosemide' or 'Chlorothiazide' is the 'most appropriate' treatment for congestive heart failure; and whether or not 'Neurons labeled at Site 3 are normal in Parkinson's disease.'"[85] "Such an inquiry," reasoned Judge Smith, "is far outside the scope of permissible judicial intervention in education."[86]

The district court, having applied the principle of law derived from *Tarka* and *Lewin I* to the actual circumstances related to the scoring of Lewin's pharmacology exam, could have ended its analysis here. The opinion, however, extended its scope to imply that Lewin might have prevailed if he had produced better evidence to challenge the substance of the answers to the exam questions. The judge considered the course materials and the other evidence offered by Lewin and concluded that Lewin's answer to Question 52 was "plainly inconsistent"[87] with the course materials and witness testimony, and his answer to Question 104 was not necessarily appropriate.[88] Had there been an apparent inconsistency between the course material and the answers scored as correct, one wonders whether the district court would have permitted the jurors to decide for themselves whether furosemide or chlorothiazide is the most appropriate treatment

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students to identify a single incorrect statement from among a list of five, but the graders gave credit for A, which Lewin contended to be an incorrect answer.

[84] *Id.* at 446.

[85] *Id.*

[86] *Id.*

[87] In another passage, Judge Smith used the phrase., "direct conflict," which may or may not be synonymous with "plainly inconsistent." "In short, there is no direct conflict apparent between Lewin's score on the pharmacology exam and any pharmacology exam or course work subsequently administered by the school." "In the absence of such a direct conflict," added Judge Smith, "any finder of fact would necessarily have to determine, based on expert testimony, whose answers were actually correct, Lewin's [answers] or the professors' [answers]." *Id.*

[88] *Id.* In considering the "objective proof" of Lewin's argument, Judge Smith wrote:

> The allegedly "parallel question" on Lewin's [subsequent pharmacology exam] merely asks whether "thiazides" are especially useful for treating congestive heart failure. Whether they are or not, it still does not follow that "Chlorothiazide" is the "most appropriate" for such treatment. Nor does Dr. Etheridge's statement regarding Lewin's answer to question 104 mandate the conclusion that he was correct in his response. *Id.*

for congestive heart failure, and whether or not Neurons labeled at Site 3 are normal in Parkinson's disease.

As precedence for its decision in *Lewin II*, the district court cited *Adatsi* as well as *Tarka*. The *Lewin II* opinion is also significant for its implicit references to the informal practice of the Department of Education regarding "amendable records." Judge Smith, in the final paragraph of her opinion, noted that Lewin's failing grade on the challenged exam "does not even appear in [Lewin's] permanent school record" while his "high pass" score on the subsequent exam "Is accurately recorded in his permanent record."[89]]

Discussion: The Utility of "Ministerial Error" Hearings

One might well imagine the reaction of Texas officials who received the *Tarka* plaintiff's request for a FERPA hearing to contest the grade in physics class. If the hearing had been granted, the dissatisfied student might effectively create a forum in which to verbally abuse the instructor for the manner in which the course was organized, the content of the syllabus, and the quality of the instruction, not to mention the grading criteria. At such a proceeding, the instructor would presumably have to present his case before a disinterested hearing officer, who would be obligated to issue a written decision on the merits of the dispute following a cross-examination of the instructor by the student, all of which would effectively strip away the instructor's authority to make the final grading decision. Add to this the possibility of legal representation for the student (or at least the presence of a lawyer), and you have a costly, aggravating, unnecessary proceeding on a matter that could otherwise be resolved through existing academic grievance channels.

According to the statute's sponsors, FERPA is not to be misused in such a way. The students in *Tarka*, *Adatsi*, and *Lewin* sought to do this, and the federal judges correctly rejected their attempts. However, if record-keeping issues arise in conjunction with substantive issues, FERPA may complicate the process of resolving the record-keeping issues separately from the substantive issues. During an academic dismissal, for instance, one might expect school officials to be confronted with multiple issues in the student's record, and the review process can become lengthy and tedious. In the case of a professional program, moreover, questions of ethical behavior and professional fitness may surface.[90] In such a setting, one might expect considerable reluctance -- even resistance -- on the part of administrators to entertain a FERPA hearing request where the FERPA hearing officer's decision is likely to have little or no effect upon the ultimate outcome of the academic review.

In the *Lewin* case, the medical college's decision to dismiss the plaintiff did not hinge upon his initial failure on the pharmacology exam . Even if Lewin had earned a passing grade on the first pharmacology exam, other shortcomings on his academic record -- incontestable under FERPA -- might still warrant dismissal by the Student Progress Committee. A second decision upholding the dismissal is not difficult to imagine since the committee was aware the first time it reviewed Lewin's academic record that he had passed his pharmacology exam on the second attempt with a mark of "high pass."

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[89] *Id.* at 446-447.

[90] See Helms & Helms, *supra* note 4.

In theory, a FERPA hearing should be relatively short since the hearing officer need only resolve the record-keeping issue at hand. But maintaining a narrow focus at a FERPA hearing may be difficult at best, especially during a contentious dismissal where a disgruntled grievant may be expected to raise substantive issues beyond the statute's intent. *Lewin* serves as a perfect example of the foot-in-the-door threat. If the medical college had provided Lewin with a hearing for the specific purpose of comparing the master answer key to his answer sheet, a circus-like atmosphere might well have developed. For even if the hearing adjudicator were to anticipate attempts by the student to challenge the substance of the exam answers or the committee's decision, he or she might be forced to interrupt the student (or the student's attorney) time and time again in order to limit the discussion to the question of the scoring of the pharmacology exam. These and other practical problems inherent in conducting "ministerial error" hearings suggest that the disadvantages of FERPA hearings significantly outweigh any constructive potential.

The threat of FERPA hearings extends far beyond the academic setting of *Lewin*. College administrators render a wide range of decisions that which affect the non-academic as well as the academic status of students. Each decision raises potential FERPA hearing issues. Students accused of misconduct, for instance, may be tempted to point to some alleged ministerial error and thereby force school officials to hold a hearing at which the student's parents or attorney might then pressure the hearing officer to consider the substantive decision at stake. *Tarka*, *Adatsi*, and *Lewin* involved academic grievances, but one might also expect such a ploy to be used in non-academic disputes. Consider, for example, an allegation of illegal drug use in a college residence hall, where a staff member reported seeing a student in possession of illegal drugs and subsequently submitted a hand-written report to the housing director. If the housing director later found the student guilty following a formal investigation, the student might circumvent the existing judicial procedure by asking for a FERPA hearing on the premise that the report typed from the staff member's original hand-written report may have contained typographical errors.[91]

One might well ask why the statute contains a hearing right at all. Not only are FERPA hearings of dubious practical utility, but other aspects of FERPA facilitate the correction of errors on student records in lieu of a hearing. Since a student has the right to access his entire education file, [92] a record discrepancy could presumably be uncovered by a routine examination.[93] Were a medical school academic review committee to place a student on probation, for instance, only to have a registrar inadvertently type "dismissed" on his transcript, the matter might easily be rectified without a hearing simply by bringing the discrepancy to the attention of the dean or president.[94] Similarly, in regard to testing procedures, both the institution and the student have a common interest in accurately recorded grades. In the event that a student were to question the scoring of a multiple choice exam, for instance, school officials might simply reveal the master answer key in the presence of the student and compare it to the student's answer sheet. That FERPA prohibits school officials from disseminating education record information -- accurate or inaccurate -- further protects the student's interests in the event of a record-keeping error.

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[91] This hypothetical example serves to illustrate the utility of the Department of Education's informal protocol, which permits a FERPA hearing only in those cases where a student alleges that inaccurate information has been recorded on an "amendable record." In the case of a residence hall hearing, one might argue that a staff member's report is not an "amendable record" triggering FERPA hearing rights.

[92] 20 U.S.C. 1232g(a)(1).

CONCLUSIONS

Lewin v. Medical College of Hampton Roads has contributed to the developing case law by clarifying the scope of FERPA in regard to the circumstances that which trigger a hearing right. FERPA was not intended as a form of national administrative procedures act, applicable to educational decisions made by school officials across the country. As the courts correctly determined in *Tarka*, *Adatsi*, and *Lewin*, the "inaccurate and misleading" language of FERPA did not create a broad procedural entitlement for students but merely aimed to reduce the frequency of administrative record-keeping errors.[95] The "ministerial error" rule of law applied in these cases loosely parallels the internal policy of the Department of Education and is arguably consistent with the Buckley/Pell joint statement, the foundation of the statute's legislative history. The scope of student hearing rights as delineated by the *Lewin* court is also consistent with the hearing rights provision of the Privacy Act of 1974, FERPA's statutory cousin.[96]

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[93] The authors of the Joint Statement, while discussing the narrow application of "inaccurate and misleading information," lauded the salutary effect of FERPA's access provisions:

> ... [If] a child has been labeled mentally or otherwise retarded and put aside in a special class or school, parents would be able to review the materials in the record which led to this institutional decision, and perhaps seek professional assistance, to see whether these materials contain inaccurate information or erroneous evaluations about their child. 120 *Cong.Rec.* 39862 (December 13, 1974).

[94] Economic considerations, for example, place an incentive upon post- secondary institutions to dismiss a student only with just cause. For a discussion of the interplay between economic considerations and the risk of error, see Judge Posner's opinion in *Osteen v. Henley*, 13 F.3d 221, 226 [88 *Ed.Law Rep.* [939]] (7th Cir.1993). Posner reasoned that institutional defendants are not likely to mistreat its student "customers" by "jerry-rig [ging] its proceedings." *Id.* at 226. The danger "is slight," the Seventh Circuit jurist wrote, "that without procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions ..." *Id.*

[95] The statute also speaks of "other privacy rights," but this provision has become practically meaningless given the dearth of constitutional privacy rights cases governing school records since 1974. Although FERPA's sponsors apparently expected school records privacy to take root in constitutional law, it did not. The constitutional right to privacy reached a jurisprudential climax with *Roe v. Wade* in 1973 but the broader privacy implications of the famous abortion decision have not materialized. The federal district court holding in *Merriken v. Cressman*

Despite such apparent consistency, several factors suggest that the jurisprudence in this area will remain in flux in the years to come unless the vague language in the statute or its regulations is amended. The Department of Education's narrow interpretation of subsection (a)(2) is not reflected in the FERPA regulations. It is apparent that the department's "amendable record" protocol was not known to the judges who decided *Tarka*, *Adatsi*, *Lewin I*, and *Lewin II*. Judicial dicta contained in these court opinions further increase the likelihood of unnecessary litigation spawned by misunderstandings as to FERPA's scope. From the Buckley/Pell joint statement, which spoke of "incorrectly recorded" grades, the Fifth Circuit in Tarka derived the term "ministerial error." This, in turn, led the judge in *Lewin I* to apply the hearing rights provision to the scoring of individual answers on a single exam in a single course where the mechanical procedure used to correct the exam questions was challenged. In *Lewin II*, Judge Smith clarified *Lewin I* by ruling that FERPA precluded the plaintiff from disputing his dismissal from medical school at a record-keeping hearing, but left open the possibility that a student might challenge the substance of a grading decision.

Given the informal policy of the Department of Education and the legislative history of FERPA, Judge Smith should have simply dismissed Lewin's cause of action on the ground that the pharmacology exam was not an amendable record subject to FERPA hearing rights. Alternatively, Judge Smith could have dismissed the FERPA cause of action by ruling that school officials had not inadvertently scored his correct answers as incorrect responses, and left it at that. Instead, the district court went on to consider Lewin's arguments regarding the content of the pharmacology exam. This would appear to be inappropriate judicial interference under the doctrine of academic abstention set forth by the Supreme Court in *Board of Curators v. Horowitz*.

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remains an anomaly.

[96] Like FERPA, the Privacy Act of 1974 permits an individual to request amendment of a record pertaining to that individual and requires the agency to correct the record in the event that such information is not accurate, relevant, timely, or complete. 5 U.S.C. § 552a(d)(2). Unlike FERPA, the hearings provision of the Privacy Act is less likely to impose unnecessary administrative burdens upon federal agencies. The types of records protected by the Privacy Act -- educational, financial, medical, criminal, and employment records -- are not agency-generated documents for the most part but copies of documents generated by others. Thus, one might expect that the record-correction mechanism in the Privacy Act is not likely to be abused by an individual named in an agency record who would attempt to use the Privacy Act as a means to alter a decision originally made by a court of law, a former employer, or an educational, financial, or medical institution.

The line of cases from *Tarka* to *Lewin II* raises troubling issues in judicial willingness to identify synonyms for "incorrectly recorded information." By resorting to synonyms, the judges were presumably attempting to delineate the practical application of FERPA while reducing the chance of a reversal on appeal. But sprinkling new terms and synonyms throughout an opinion poses risks. This practice has effectively created a semantic slippery slope. Besides being unnecessary, such judicial behavior may inadvertently generate frivolous litigation. A student anxious to circumvent conventional grievance procedures might now point to any one of several different bases for a FERPA hearing derived from judicial dicta, ranging from "mathematical errors" (*Tarka*) to "ministerial errors" (*Tarka*) to "mistakenly scored questions" (*Lewin I*) to answers "plainly inconsistent" with course materials (*Lewin II*). As if this were not confusing enough, Tarka also speaks of a hearing right to challenge a grade "which [does] not reflect what the grader intended."

Future courts, in lieu of relying upon terms that which do not appear in the body of the statute or the legislative history, would be wise to broaden their inquiry. The Department of Education has developed policy appropriate to judicial consideration. When students request a FERPA hearing, the Family Policy Compliance Office recommends that school officials first determine whether the document in question is subject to FERPA hearing rights protection. In the case of a multiple choice examination, each test and answer sheet completed by a student becomes part of the student's education record, according to the Family Policy Compliance Office. The answer sheet is not, however, an "amendable record." Thus, under FERPA's access provisions, a student has a right to review a test he or she completed but the student must pursue internal school grievance channels in order to remedy a scoring mistake.[97] Future courts would also be wise to insist that a student- plaintiff demonstrate that he or she explicitly requested school officials to provide a FERPA record-keeping hearing and specifically described in reasonably precise terms the alleged record-keeping error.[98]

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[97] Family Policy Compliance Office, U.S. Department of Education, Washington, D.C. to Thomas R. Baker, September 12, 1996 telephone conversation. The Department of Education does not consider a test to be an amendable record in most cases. Depending upon how a test grade is recorded by school officials, a hearing right might arise if there is a veritable mistake in the recording process. In a class with two students named John Smith, for instance, either student would be entitled to a FERPA hearing to determine if the instructor mistakenly credited John A. Smith's grade on a test in the grade book to John B. Smith, or vice-versa.

[98] Judge Jackson's decision in *Lewin I* may present a practical problem to school officials served with a general (i.e. non-specific) FERPA hearing request. The Eastern Virginia District Court did not indicate if the student's request to school officials for a hearing specifically mentioned the record-keeping error regarding the pharmacology exam, nor did the court indicate whether such a request must include such a specific reference. This was not an insignificant oversight by the court since one might expect that school officials caught in the middle of a contentious academic dismissal are not likely to grant a FERPA hearing request unless the request specifically alleges a record-keeping error.

If the idiosyncrasies contained in the *Lewin* opinions inspire the Family Policy Compliance Office to promulgate its internal policy on hearing rights in the form of a regulation, the statute itself should be re-evaluated. FERPA proponents aimed to discourage the impulse to store sensitive information without imposing unreasonable administrative burdens on schools. In retrospect, this aim may not necessitate a specific statutory hearing right to challenge inaccurately recorded information. Budgetary concerns, moreover, might well cause citizens in the 1990's to question whether tax revenues should be allocated to cover the cost of record-keeping hearings replete with attorneys.[99]

The potential administrative burden imposed by the FERPA hearing provision is significant. The economic costs of FERPA were not adequately considered at the time of its enactment. Two decades of experience and social change have revealed other shortcomings as well. The frequency of student-to-student violence on campus has increased, as have public concerns about the rights of victims. FERPA's legislative history makes no mention of student victims, and by only considering the rights of students accused of misconduct the original law failed to account for competing student interests.[100] If recent articles in the media critical of school officials' handling of student discipline is any indication, the public's mistrust of secrecy may have superseded concerns about the long-term risks of maintaining stigmatizing information in school records.[101]

All things considered, it may be time to delete the hearing rights provision from FERPA and rely entirely upon constitutional law, contract law, and state administrative procedure acts to ensure the hearing rights of students. Given the sunshine effect of FERPA's record access provisions, parents and students in the 1990's may have little reason to fear that sensitive information contained in education records will be incorrectly transferred from one document to another within the school setting without fair consideration for correcting such an error. While students can be wrongly accused of misconduct or subject to arbitrary sanctions,[102] it is a difficult task for a legislative body to delineate the intricate complexities associated with procedural due process.[103] Such complexities cannot be adequately captured by statutory language that which establishes a general hearing right to challenge "inaccurate or misleading" information in student records, particularly when such language was only intended to afford a hearing where the information contained in official school documents was inconsistent with other school records. At the very least, the issues raised in *Lewin* provide a platform upon which to reexamine the presumptions of FERPA's sponsors.

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[99] The last two decades have revealed the relatively high price of proceduralism imposed at the state level and raised questions about the ultimate effectiveness of formal administrative procedures in every case. See, A.E. Bonfield, "Administrative Procedure Acts in an Age of Comparative Scarcity," 75 *Iowa Law Review* 845 (1990).

[100] In response to charges that FERPA protected the rights of student perpetrators of violence at the expense of student victims, Congress amended the Student Right-to-Know & Campus Security Act in 1992 to provide that complainants in such cases had a right to be informed of the outcome of disciplinary complaints. Pub.L. 102-325 Sec. 486(c)(2).

[101] E.g. Nina Bernstein, "With Colleges Holding Court, Discretion Vies With Fairness," *New York Times*, May 5, 1996, p. 1; and "Behind Some Fraternity Walls, Brothers in Crimes," *New York Times*, May 6, 1996, p. 1.

[102] See T.R. Baker, "The Meaning of Due Process 30 Years After Dixon: Rhetoric But Little Research," 30 *NASPA Journal* 1 (1992).

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[103] *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Recognizing the competing interests at stake, the Supreme Court fashioned a flexible and multi-dimensional balancing test to determine procedural due process rights under the Fourteenth Amendment.

Commentary

LITIGATION INVOLVING FERPA*

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The Family Educational Rights and Privacy Act (FERPA) was passed in 1974 with two overarching purposes: permitting access by students and parents[1] to education records;[2] and restricting access by others to student education records.[3] In part reflecting earlier judicial and administrative determinations that had reached the same conclusion regarding parent access to their children's records based on parental control of children,[4] FERPA granted parents the right to inspect, review and amend student records.[5] But FERPA granted parent access only to "education records" and prohibited access to employment records, medical records and law enforcement records.[6] In addition, parents lost access to the records of their children when they

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[1] Parents lose their right of access to student education records and the right to consent to release of records when a child attains 18 years of age or attends an institution of postsecondary education. 20 U.S.C. § 1232g(d).

[2] 20 U.S.C. § 1232g(1)(A).

[3] 20 U.S.C. § 1232g(b)(1) and (2).

[4] *See, e.g., Van Selen v. McCleary*, 27 Misc.2d 81, 211 N.Y.S.2d 501 (1961) (parents granted access to child's records because parents had educational authority over their child); Matter of Wilson, 11 Ed.Dept.Rep. 208 (N.Y. Comm'r of Educ.1972) (state commissioner of education granted parents permission to examine child's records and ordered expunging of certain references because authority of public schools to act in place of parents did not permit a school board to act in opposition to right of parent to full and complete disclosure).

[5] 20 U.S.C. § 1232g(a)(1)(A) and (C)(2).

[6] 20 U.S.C. § 1232g(a)(4)(B).

attained age 18 or attended a postsecondary institution.[7] The other half of FERPA, restricting access by others to student records, recognized confidentiality of student records as well as "personally identifiable information" contained therein.[8] FERPA created three methods by which student records could be released: parent consent (or student consent for those over age 18 or who have attended postsecondary education institutions);[9] directory information, as defined by the institution, with the right of parents (or students) to object to release of some or all of such information;[10] and a broad list of persons, agencies, and organizations to which parents or students cannot object.[11]

Enforcement of FERPA was, and is, the responsibility of the Family Policy Compliance Office of the U.S. Department of Education[12] with the penalty being withdrawal of funds administered by the Department.[13] However, the statute provides that "action to terminate assistance may be taken only if the Secretary [of Education] finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means."[14] Because this administrative process can be slow, dissatisfied parents and students have sought to enforce the provisions of the statute in court. However, courts have consistently held that FERPA does not create a private cause of action because enforcement has been clearly left in the hands of the Secretary of Education and the statute does not confer a private remedy on parents and students who have access to records.[15] But parents and students have been more successful under section 1983 of the Civil Rights Act of 1964,[16] and more recently under section 1985(3).[17]

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[7] 20 U.S.C. 1232g(a)(B)(iv). However, postsecondary institutions are still permitted to release student information (such as grades) to "parents of a dependent student of such parents" without student permission. 20 U.S.C. § 1232g(b)(1)(H).

[8] 20 U.S.C. 1232g(b).

[9] 20 U.S.C. 1232g(b)(2)(A).

[10] 20 U.S.C. § 1232g(a)(5)(A) and (B). Directory information includes the following:

> the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of member of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

[11] 20 U.S.C. § 1232g(b)(1). Some of these statutory exclusions are: school officials with "legitimate educational interests;" officials of a school to which a child is transferring; information in connection with an application for financial aid; and accrediting agencies.

[12] 20 U.S.C. § 1232g(f). 34 C.F.R. § 99.60. The Office can be contacted at:

Family Policy Compliance Office
Office of Human Resources and Administration
U.S. Department of Education
400 Maryland Ave. SW
Washington, D.C. 20202-4605
Telephone: (202) 732-1807

[13] 20 U.S.C. 1232g(a)(1)(A), (a)(2), (b)(1), (b)(2).

This article will review the case law that has developed in litigating the rights of parents and students who have either been denied access to student records or whose records have been released in violation of FERPA. The first part of the article will examine issues surrounding access questions under FERPA. The second part will analyze cases addressing legal issues pertaining to release of student records or dissemination of personally identifiable information. The third part will consider some implications under FERPA for educational institutions involving issues of both access to and release of education records.

ACCESS ISSUES UNDER FERPA

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[14] 20 U.S.C. § 1232g(f).

[15] *See Girardier v. Webster College*, 563 F.2d 1267 (8th Cir.1977); *Price v. Young*, 580 F.Supp. 72 (D.C.Ark.1983); *Faye v. South Colonie Cent. School Dist.*, 802 F.2d 21 [35 *Ed.Law Rep.* [71]] (2d Cir.1986); *Norwood v. Slammons*, 788 F.Supp. 1020 [74 *Ed.Law Rep.* [1128]] (W.D.Ark.1991); *Francois v. University of Dist. of Columbia*, 788 F.Supp. 31 [74 *Ed.Law Rep.* [1085]] (D.D.C.1992); *Rothman v. Emory Univ.*, 828 F.Supp. 537 [85 *Ed.Law Rep.* [66]] (N.D.Ill.1993); *Maynard v. Greater Hoyt School Dist.*, 876 F.Supp. 1104 [98 *Ed.Law Rep.* [126]] (D.S.D.1995).

[16] 42 U.S.C. § 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...."

[17] 42 U.S.C. § 1985(3) provides in part:

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person of class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... if one or more persons therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured of deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.

Parent Access

Despite a broad right of access for parents and students to education records under FERPA, courts have still been required to resolve questions of access. Occasionally, parent claims of access involve an interplay between FERPA and state law. In *Fay v. South Colonie Central School District*,[18] a parent with joint legal custody pursuant to a marriage separation agreement was initially unsuccessful in demanding from the superintendent, where his children attended school, information ranging from standardized test results and accident reports to notices about classroom parties and cafeteria menus. Plaintiff's demand was based on his ex-wife's failure to comply with the terms of the separation agreement whereby she would consult with plaintiff on a specified number of education-related subjects.[19] Initially, the superintendent's response to plaintiff's request was that he would comply with a court determination that plaintiff had a right of access to the children's records. However, following a letter from the U.S. Department of Education, the superintendent, after an eleven month refusal to provide access to records, began to mail copies of the children's education records to plaintiff, but refused to mail duplicates of notices mailed to the ex-wife or carried home by the children. Plaintiff filed suit against the school district under a number of legal theories,[20] including violation of FERPA under section 1983. A federal district court found that, under New York law,[21] joint custodial parents must have equal access to "education information"[22] and required the school to place plaintiff on its mailing list and forward to him, at his expense, all information mailed to the children's household. In reversing a federal district court's award of only nominal damages under section 1983 for the eleven month delay in the school complying with plaintiff's request for access to education records, the Second Circuit of Appeals directed that plaintiff be provided an opportunity to present evidence of compensatory damages he suffered "as a result of the violation of his right to inspect his children's education records."[23]

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[18] 802 F.2d 21 [35 *Ed.Law Rep.* [71]] (2d Cir.1986).

[19] *Id.* at 24. The terms of the agreement included, in part, that the ex- wife:

> must ... consult with [plaintiff] concerning ... schooling, relevant to which school [the children] should attend, whether public or private, matters concerning any special education courses which the children may pursue or desire to pursue and further, the [ex-]wife is to provide [plaintiff] with report cards of the children or photographic copies thereof....

[20] Plaintiff's due process claim that she had been denied her fundamental constitutional right to direct the upbringing of her child was rejected by the district court and upheld by the appeals court. Both courts determined that "the school district had [no] constitutional duty to mail [all documents] to each parent." The conclusion to be drawn from the appeals court decision would appear to be that, even though parents have no constitutional right to having student information mailed to they, they would seem to have such a right under FERPA. *Id.* at 26.

[21] *See Page v. Rotterdam-Mohonasen Cent. School Dist.*, 109 Misc.2d 1049, 441 N.Y.S.2d 323 (1981).

[22] *Fay*, 802 F.2d at 26. "Education information" would appear to be a broader category than "education records" but, even if it is, the context of this case indicates that the broader category is appropriate only in joint custody situations as defined under the law of individual states.

In *Belanger v. Nashua, New Hampshire, School District*,[24] a child who had been deemed educationally disabled under IDEA had been placed at a residential educational facility under the state's juvenile delinquency statute. The child's parent, challenging placement and services under IDEA as inappropriate, requested reimbursement for expenses incurred attendant to her son's placement at the juvenile facility and, subsequent to denial of this request, filed suit under section 1983 and subpoenaed all school district records, including the juvenile court proceedings. The attorney for the school district who was a member of the child's evaluation team maintained files on the juvenile proceedings separate from the cumulative folder in the school district's central office. In addition to objecting to the claim for reimbursement, the school district refused to furnish copies of juvenile court records in its possession, absent a court order. In finding for the parent, along with an award of costs and attorney fees, the federal district court held that "the intent of FERPA is not only to protect the privacy of students, but to insure that parents have access to their children's records which are used to make crucial decisions about their children's future."[25] The rationale for this decision is worth reflecting upon.

> On its face, other than the exceptions that are not applicable, [FERPA] does not distinguish records based on their source.... A parent has a right of access to all records maintained by the District which are not subject to the exclusions of section 1232g(a)(4)(B).... [T]he District was made a party to [the child's] juvenile proceedings and was sent copies of his records because the proceedings directly affected his status as a student under the supervision of the District. His problems with the court system, along with his educational disabilities, had a direct bearing on his educational and residential placement.[26]

However, the balance protecting student privacy rights in juvenile proceedings may be weighed differently where parents are the ones seeking to protect access by another party. In *Webster Groves School District v. Pulitzer Publishing Company*,[27] both FERPA and EHA

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[23] *Id.* at 34.

[24] 856 F.Supp. 40 [93 *Ed.Law Rep.* [570]] (D.N.H.1994).

[25] *Id.* at 52.

[26] *Id.* at 49. Section 1232g(a)(4)(B) excludes from "education records" those in the possession of instructional personnel and made available only to substitutes, law enforcement records, employment records, and parent access to records of students over 18 years of age or who are attending a postsecondary institution.

[27] 898 F.2d 1371 [59 *Ed.Law Rep.* [630]] (8th Cir.1990).

(IDEA) were implicated when parents were successful in closing a juvenile court disciplinary hearing involving a disabled child and in sealing the court file against First Amendment access claims by a newspaper. The federal district court had prohibited the newspaper's access to the court proceeding and records in an expulsion hearing involving a disabled child who had threatened students with a handgun. In sustaining that decision, the Eighth Circuit Court of Appeals found consistency in purpose among the state's juvenile court statute,[28] FERPA and EHA[29]

> favoring the special protection of minors and their privacy where sensitive and possibly stigmatizing matters are concerned. This strong public policy applies forcefully to students classified as handicapped because of a learning disability or some other disability that affects their educational progress ... Whether we apply a constitutional standard or a common law standard, the result is the same: [the newspaper's] interest in access to the records in this case is clearly outweighed by [the student's] privacy interest and the state's interest in protecting minors from public dissemination of hurtful information. Even though the judicial proceedings in this matter are completed, [the student] may be stigmatized and humiliated if

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[28] Mo.Rev.Stat.Ann. § 211.171.5 (Vernon's Supp.1996)

> ("The general public shall be excluded [from juvenile hearings] and only persons admitted as have direct interest in the case or in the work of the court....")

[29] 20 U.S.C. § 1417(c) [IDEA] provides that:

> The Secretary shall take appropriate action, in accordance with the provisions of section 1232g [FERPA], to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this chapter.
>
> IDEA regulations at 34 C.F.R. § 300.571 provide in part:
>
> (a) Parental consent must be obtained before personally identifiable information is--
>
> (1) Disclosed to anyone other than officials of participating agencies collecting or using the information....
>
> In addition, 34 C.F.R. § 300.572 provides in part:
>
> (a) Each participating agency shall protect confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

> the sensitive information in the record is made public, and that is reason enough to seal the file and keep it closed.[30]

The combination of privacy interests under FERPA and IDEA are such that unauthorized release of confidential information regarding a child with disabilities can support a section 1983 claim.[31]

Student Access

Student access presents different legal issues from those of parents. Students must be in attendance at an educational institution before they can have access to education records. In *Tarka v. Franklin*, (*Tarka I*)[32] a student denied admission to a graduate program at the University of Texas alleged a FERPA violation under section 1983 when he was refused access to his admission file, particularly the letters of recommendation. FERPA provides that a "student" ... does not include a person who has not been in attendance at [an educational] agency or institution.[33] Because the student lacked graduate status, he was permitted, over a period of six semesters, only to audit classes, but he claimed in his complaint that auditing courses was sufficient to constitute attendance for FERPA purposes. Unless students at a postsecondary institution have waived their right of access to letters of recommendation, they explicitly have access under FERPA to all letters placed in education records after January 1, 1975.[34] Thus students in attendance at a college or university could access letters of recommendation. But for purposes of access to education records, persons auditing courses are not "students" within FERPA. However, *Tarka I* also recognizes that persons auditing courses were nonetheless entitled to some protection under FERPA, and thus the court raised a more far-reaching question, namely whether persons denied admission to a postsecondary institution can use FERPA to challenge their denial of admission. Although the two questions are related, the court in *Tarka I* carefully crafted a distinction between persons denied admission who audit courses and persons who are "students": "a rejected applicant who is accepted for auditing in the department or school which denied him formal admission may access grades or other information regarding the audited courses but not information regarding the school's rejection decision."[35] The inference to be drawn from *Tarka I* is that a person's rights under FERPA depend both on whether one is a student attending classes and whether one has been admitted to a program.

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[30] *Webster Groves*, 898 F.2d at 1375.

[31] *See Sean R. v. Board of Educ. of Town of Woodridge*, 794 F.Supp. 467 [76 *Ed.Law Rep.* [785]] (D.Conn.1992).

[32] 891 F.2d 102 [57 *Ed.Law Rep.* [743]] (5th Cir.1989).

[33] 20 U.S.C. § 1232g(a)(6).

[34] 20 U.S.C. § 1232g(a)(1)(B)(ii) and (iii).

[35] *Tarka*, 891 F.2d at 107.

An extension of *Tarka I* is that prospective students also have no rights under FERPA. In *Norwood v. Slammons*,[36] a future law student had no claim to release of information pertaining to discipline of several students for sexual misconduct. As the court in Norwood observed, “a violation of FERPA must be premised upon a release of information, or refusal to do so, pertaining to the plaintiff's attendance or that of plaintiff's children.”[37] However, educational information that is defined by statute as “public records” may be accessible under state freedom of information acts.[38]

Just as FERPA could not be used by prospective students in *Tarka I* to challenge admission decisions, the statute also cannot be used to challenge faculty grades. In *Tarka v. Cunningham* (*Tarka II*),[39] a student challenged, under FERPA and section 1983, his being awarded a “C” in an undergraduate physics course. Section 1232g(a)(2) of FERPA provides that “[n]o funds shall be made available ... unless ... students ... are provided an opportunity for a hearing ... to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students....” In affirming the district court's dismissal of plaintiff's complaint, the Fifth Circuit Court of Appeals held that FERPA does not create for students “a federal right, enforced by federal regulations, to challenge their teachers' or educational institution's grading process.”[40] Characterizing the facts of this case as presenting “an ongoing dispute with the professor regarding a homework problem and the semester grade apparently resulting in part therefrom,"[41] the appeals court found that the university had a grade dispute process to resolve questions regarding "the way a teacher grades his students."[42] Since the student did not allege that the grade recorded was not the one intended by the professor, that the grade was not mathematically inaccurate, or that maintenance of the grade by the university violated his privacy, no section 1983 claim under FERPA existed. Nor does the statutory language, "other rights of students," expand upon the enumerated rights in FERPA. Thus, although FERPA grants students a right to a hearing regarding information in student records, the purpose of that hearing is narrowly circumscribed.[43] *Tarka II* supports a significant body of law that courts will generally defer to an educational institution's academic standards and determination of academic performance.[44]

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[36] 788 F.Supp. 1020 [74 *Ed.Law Rep.* [1128]] (W.D.Ark.1991).

[37] *Id.* at 1026.

[38] *Id.* at 1024-25, 1031 (court in *Norwood* did not reach merits of plaintiff's claim under Arkansas' Freedom of Information (FOI) law because plaintiff had failed to state a federal claim, but indicated that she could raise FOI claim in state court). *See* Ohio.Rev.Stat.Ann. § 149.43 (Baldwin Supp.1995) (“‘Public record’ means any record that is kept by any public office including, but not limited to, state, county, city, village, township, and school district units, except ... records the release which is prohibited by state or federal law.”) *See also, State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 637 N.E.2d 911 [92 *Ed.Law Rep.* [1259]] (Ohio 1994) (promotion and tenure records maintained by a state-supported institution of higher education are “public records” under state Freedom of Information Act [FOIA]); *Bowie v. Evanston Community Consolidated School Dist.*, 128 Ill.2d 373, 131 Ill.Dec. 182, 538 N.E.2d 557 [53 *Ed.Law Rep.* [953]] (Ill.1989); *Kryston v. Board of Educ., East Ramapo Cent. School Dist.*, 77 A.D.2d 896, 430 N.Y.S.2d 688 (App.Div.1980) (under state FOIA, test scores for classes of students in various grades and schools in 11 different testing categories could be released where individual identifying information could be redacted and the record scrambled to prevent alphabetical identification of students).

[39] 741 F.Supp. 1281 [62 *Ed.Law Rep.* [205]] (W.D.Tex.1990), aff'd, 917 F.2d 890 [63 *Ed.Law Rep.* [746]] (5th Cir.1990).

[40] *Tarka*, 917 F.2d at 892.

However, judicial deference to an institution's academic policies does not mean that a cognizable cause of action cannot exist under FERPA. In *Lewin v. Medical College of Hampton*

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[41] *Id.*

[42] *Id.* at 891.

[43] The conclusion that FERPA does not reach the grading process is supported by the legislative history.

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, parents of student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to this law contest whether a teacher should have assigned a higher grade because the parents or students believe that the student was entitled to a higher grade.
> 120 *Cong.Rec.* 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment).

[44] *E.g., see Sage v. CUNY Law School*, 208 A.D.2d 751, 617 N.Y.S.2d 825, 826 [95 *Ed.Law Rep.* [356]] (App.Div.1994) (refusal of law school to change student's failing course grade resulting in her dismissal from law school not reviewable by court where "no evidence that the [school's] professional judgment was rendered in an arbitrary and capricious manner"); *Benson v. Trustees of Columbia Univ. in City of New York*, 215 A.D.2d 255, 626 N.Y.S.2d 495, 496 [100 *Ed.Law Rep.* [672]] (App.Div.1995) (in absence of evidence that plaintiff's failure on Ph.D. oral examination was "arbitrary and capricious, irrational, made in bad faith, or in violation of the Constitution or statute ... allegations ... that the grading of her dissertation defense committee was arbitrary and capricious ... are beyond judicial review"). *See generally*, Mawdsley, *Academic Misconduct: Cheating and Plagiarism* 45-52 (1994).

Roads,[45] a student dismissed for poor performance from a medical school alleged that the school's hearing accorded him prior to his dismissal violated his due process rights and the refusal of the school to permit a hearing to challenge a scoring error on a pharmacology exam violated FERPA. The court found that the medical school satisfied due process requirements for academic decisions where a "student had prior notice of faculty dissatisfaction with his ... performance and of the possibility of dismissal, and the decision to dismiss the student was careful and deliberate."[46] For purposes of academic decisions, due process does not require that a student receive a formal hearing[47] nor that the student have an attorney present.[48] However, FERPA is more specific regarding hearing requirements that include a formal hearing within a reasonable time following a request, advance notice of date, time and place of the hearing, a hearing conducted by a person who does not have a direct interest in the outcome, and representation by a person of the student's choice including an attorney.[49] In *Lewin*, the court found that plaintiff stated a cognizable claim under FERPA that the medical school had made scoring errors in an exam for one of the courses and, therefore, plaintiff was entitled to the hearing provided for in FERPA. *Lewin* suggests that the line between scoring inaccuracies, for which a student is entitled to a FERPA hearing, and the process by which an instructor determines grades, which is not subject to FERPA, is not always easy to discern. However, *Lewin* does seem to clearly indicate that, if a FERPA hearing is required, it is limited to consideration only of matters involving inaccurately reported or recorded grades or invasion of privacy; other legal questions may by raised under a number of legal theories, but in a different venue.[50]

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[45] 910 F.Supp. 1161 [106 *Ed.Law Rep.* [581]] (E.D.Va.1996).

[46] *Id.* at 1167, citing to *Schuler v. Univ. of Minn.*, 788 F.2d 510, 514 [31 *Ed.Law Rep.* [770]] (8th Cir.1986), *cert. denied* 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 [36 *Ed.Law Rep.* [1115]] (1987), citing in turn to *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85, 98 S.Ct. 948, 952, 55 L.Ed.2d 124 (1978). In *Lewin*, the medical school's Student Progress Committee reviewed plaintiff's mixed evaluations of clinical rotations and clerkships and failed courses and concluded that plaintiff "had not demonstrated an acceptable level of academic and clinical achievement, as well as a style and standard of professional judgment and behavior that is consistent with the responsibilities of the medical profession." That decision was, in turn, reviewed by a department chair and the provost. The fact that the decision to dismiss plaintiff rather than place him on probation was a close call was immaterial for due process purposes because "such a call rests firmly with the professional judgment of the Committee." *Lewin*, 910 F.Supp. at 1167, 1168.

[47] *See Horowitz*, 435 U.S. at 88, n. 3, 98 S.Ct. at 953, n. 3 ("a hearing [in an academic dismissal case] is not required by the due process clause of the fourteenth amendment.") But universities can require a hearing, in which case, the hearing must be provided as part of its contract with the student. *See, e.g., Tedeschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 404 N.E.2d 1302 (N.Y.1980) (where university rules called for a hearing panel, informal meetings with two deans and the president's assistant was not sufficient compliance).

[48] *Id.* at 89, 98 S.Ct. at 954 ("a school is an academic institution, not a courtroom or administrative hearing room.") See also *Jaksa v. Regents of Univ. of Mich.*, 597 F.Supp. 1245, 1252 [21 *Ed.Law Rep.* [845]] (E.D.Mich.1984) which suggested three reasons why an attorney was not required in a student dismissal case involving cheating:

> (1) The Manual of Procedures for the Academic Judiciary [the university's hearing committee] is written in plain English and is comprehensible to the average college student.
>
> (2) The University did not proceed against [the student] through an attorney or other representative.
>
> (3) [The hearing was not] subject to complex rules of evidence or procedure.

RELEASE OF INFORMATION

Statutory Claims

FERPA limits access to education records by controlling to whom those records can be released. Just as failure to provide access for parents or students can be the basis for a section 1983 claim, so also can inappropriate release of student records. Frequently, demands for education records require courts to balance access rights to public records under state freedom of information laws with protection of student privacy under FERPA or state statutes.[51]

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[49] 34 C.F.R. § 99.22.

[50] *E.g., see, Lewis v. Russe*, 713 F.Supp. 1227 [54 *Ed.Law Rep.* [505]] (N.D.Ill.1989) (a black plaintiff dismissed after taking the first year in medical school and not being allowed to take more than two makeup exams per semester as per the announced school policy, stated a section 1981 cause of action); *Samper v. University of Rochester Strong Memorial Hosp.*, 139 Misc.2d 580, 528 N.Y.S.2d 958 [47 *Ed.Law Rep.* [284]] (Sup.Ct.), *aff'd as modified*, 144 A.D.2d 940, 535 N.Y.S.2d 281 [50 *Ed.Law Rep.* [877]] (App.Div.1988) (a female student alleging discriminatory treatment during her residency training because of comments about the weakness of female sex stated a cause of action under New York's Human Relations Law). *See also, Petock v. Thomas Jefferson Univ.*, 630 F.Supp. 187 (E.D.Pa.1986) (student dismissed for failing clinical rotations and courses and being denied readmission was unsuccessful in ADEA claim where younger students had also failed and been dismissed and been denied readmission); *Doe v. Washington Univ.*, 780 F.Supp. 628 [72 *Ed.Law Rep.* [125]] (E.D.Mo.1991) (student with AIDS disenrolled from a dental program failed in his claims under the Rehabilitation Act of 1973).

[51] Although the result in terms of access to student records will be the same, states use different approaches in defining access for purposes of freedom of information. For a comparison of two different approaches, see:

Md.Code Ann., State Government § 10-616(k) (Supp.1995)

In *Krauss v. Nassau Community College*,[52] a person for an unspecified reason requested under New York's Freedom of Information Law the names and addresses of all students at the college, the basis for his request being that such information is classified as directory information under FERPA.[53] New York excludes records that are exempted by state or federal statutes from its freedom of information law.[54] The college's defense in *Krauss* was that, although names and addresses can be part of directory information, colleges are free under FERPA to designate the kinds of information that will be directory.[55] In *Krauss*, since the college had chosen not to

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> (1) Subject to paragraph (2) of this subsection, a custodian shall deny inspection of a school district record about the biography, physiology, religion, academic achievement, or physical or mental ability of a student.
>
> (2) A custodian shall permit inspection by:
> (I) the person in interest; or
> (ii) an elected or appointed official who supervises the student.

Utah Code Ann. § 53A-13-301 (Supp.1995)

> Employees and agents of the state's public education system shall protect the privacy or students, their parents, and their families, and support parental involvement in the education of their children through compliance with the protection provided for family and student privacy under section 53A-13-302 and the Federal Family Educational Rights and Privacy Act and related provisions under 20 U.S.C. § 1232(g) and (h), in the administration and operation of all public school programs, regardless of the source of funding.

[52] 122 Misc.2d 218, 469 N.Y.S.2d 553 [14 *Ed.Law Rep.* [1081]] (Sup.Ct.1983).

[53] For list of directory information under FERPA, *see supra*, note 10.

[54] N.Y. Public Officers Law § 87(2)(a) (McKinney Supp.1995).

> Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that ... are specifically exempted from disclosure by state or federal statute.

[55] See 34 C.F.R. § 99.37( )(1)

> An educational agency or institution may disclose directory information if it has given public notice to parents or students in attendance and eligible students in attendance at the agency or institution of:
>
> (1) The types of personally identifiable information that the agency or institution

include students' names and addresses in that classification, plaintiff's claim fell within the state's freedom of information act exclusion. However, if a school collects directory information, that information will probably be subject to freedom of information access.[56]

Information that would not have been classified as public records while a person is a student can lose protected status once the person is no longer a student. In *Klein Independent School District v. Mattox*,[57] a teacher in a school district sought to block disclosure, under the Texas Open Records Act,[58] of her transcript included in her personnel file. Claiming protection under both FERPA and First Amendment privacy rights, the teacher's argument of an "interest in maintaining the confidentiality of her academic career"[59] was unavailing. The court found FERPA inapposite to plaintiff's claim because since "she is an employee and not a student of the institution requested to disclose her transcript, she [did] not fall within the class of people for whose benefit FERPA was created."[60] Reflecting in part on FERPA's legislative history,[61] the court concluded that a "student has a privacy right in his academic records."[62] However, the

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> has designated as directory information....

[56] *See Kestenbaum v. Michigan State Univ.*, 414 Mich. 510, 327 N.W.2d 783 [8 *Ed.Law Rep.* [444]] (1980) (university's notice in student handbook identifying categories of directory information and providing students the right to exclude items from such information met FERPA requirements and, therefore, computer tape containing student names and addresses could be released without securing student consent).

[57] 830 F.2d 576 [42 *Ed.Law Rep.* [70]] (5th Cir.1987).

[58] Tex.Rev.Civ.Stat.Ann. art. 6252-17a, § 1 et seq. (West Supp.1995).

[59] *Id.* at 581.

[60] *Id.* at 579.

[61] *See* 120 *Cong.Rec.* S39858 (daily ed. Dec. 13, 1974) (joint remarks of Sen. Buckley and Sen. Pell) as interpreted in *Smith v. Duquesne Univ.*, 612 F.Supp. 72, 80 [26 *Ed.Law Rep.* [604]] (W.D.1985).

> FERPA's legislative history indicates that it is principally a right to privacy of educational records act. FERPA was adopted as a response to a growing nationwide concern that no provisions existed to protect school records from unauthorized use. With the threat of financial sanctions, FERPA seeks to deter schools from indiscriminately releasing student records and places a heavy burden on a party seeking access to student records to demonstrate a genuine need which outweighs the student's privacy interest.

[62] *Klein*, 830 F.2d at 580. But this privacy interest in avoiding disclosure of personal matters represents a different level of constitutional protection from a person's privacy "interest in

public's interest in access to teacher records under the state open records statute outweighed the teacher's interest in privacy in the transcript in her school district personnel file.

> We agree with the district court in tipping the balance in favor of the right of the public to know the academic records of the schoolteachers of their children.... Recently, there has been grave concern in Texas about the quality of public education.... Many teachers who had been certified and were teaching in Texas classrooms could not pass a basic test of minimum competency. In light of this apparent lack of competency prevalent in the state, the public must have full and complete information concerning the teachers who serve the public in educating their children.[63]

But *Klein* leaves open the possibility that a person may have a protectable privacy interest in personnel files, and, indeed, the Texas Open Records Act exempts from public disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[64]

A more recent development has been statutory claims under section 1985(3) of the Civil Rights Act of 1964.[65] This federal statute provides a cause of action where persons or entities have conspired to deprive a person of a protected right, through actions based on "some racial, or perhaps other class- based, invidiously discriminatory animus."[66] Elements of a cause of action

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independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977).

[63] *Id.* at 581.

[64] Tex.Rev., Civ.Stat.Ann. art. 6252-17a, § 3(a)(2). But see, Ohio Att.Gen.Op. 90-050 (pursuant to Ohio's freedom of information act, the recorded name, address, and telephone number of each employee of a public school district is a public record open to inspection by any person, even if information is to be used for commercial or professional sales solicitation).

[65] *See supra* note 17 for text of section 1985(3).

[66] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 765, 122 L.Ed.2d 34 (1993). *See Green v. State Bar of Tex.*, 27 F.3d 1083 (5th Cir.1994) (insurance adjuster failed to assert essential element of claim under civil rights conspiracy statute, where insurance adjuster merely alleged that legal counsel for Texan State Bar's Unauthorized Practice of Law Committee attempted to interfere with adjuster's business to prevent unauthorized practice of law, but did not allege that legal counsel's actions were motivated solely by adjuster's race). But *see, Maynard v. Greater Hoyt Sch. Dist.* No. 61-4, 876 F.Supp. 1104, 1109 [98 *Ed.Law Rep.* [126]] (release of name of parents whose special education child had been paid out-of-state residential expenses, requiring a local tax levy increase, not a basis for section 1985(3) because "families seeking public special education services [are not] a class protected by section 1985(3).")

under section 1985(3) are: (1) conspiracy; (2) for depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of citizens of the United States.[67] However, although this statutory remedy has been successful in a variety of settings,[68] to date it has not been applied to education where only school districts are defendants.[69] Courts have consistently held, in actions against school boards and their employees, that "[a] school board ... is a collection of individuals ...; a school board and its employees constitute a single legal entity which is incapable of conspiring with itself for the purposes of section 1985(3)."[70]

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[67] *See, e.g., Saville v. Houston County Healthcare Authority*, 852 F.Supp. 1512 [92 *Ed.Law Rep.* [478]] (M.D.Ala.1994) (student in anesthesia course at school of nursing submitted sufficient circumstantial evidence to make out prima facie case of conspiracy under section 1985(3); student alleged that she was forced to continue to work with and be evaluated by instructor after she complained of sexual harassment by him, that her clinical performance thereafter suffered, and that institutional defendants newly were newly implemented by director in evaluating and dismissing her).

[68] *E.g., see, Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th Cir.1994) (physician stated a claim under civil rights conspiracy statute where physician alleged that members of hospital's supervisory committee conspired to suspend his staff privileges and falsely accused him concerning his skill as a physician because of his race and race of his patients); *Saville, supra*, note 67.

[69] *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist.*, 926 F.2d 505 [65 *Ed.Law Rep.* [1089]] (6th Cir.1991), *cert. denied*, 501 U.S. 1261, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991) (superintendent, executive director of district and school administrator could not conspire because all were members of same collective entity); *Moody v. Jefferson Parish Sch. Bd.*, 803 F.Supp. 1158 [78 *Ed.Law Rep.* [759]] (E.D.La.1992) (school board, principal, vice-principal, and various teachers all employed by the school board were a single entity); *Hankins v. Dallas Indep. Sch. Dist.*, 698 F.Supp. 1323 [50 *Ed.Law Rep.* [371]] (N.D.Tex.1988) (high school and its officials constitute a single entity); *Chamliss v. Foote*, 421 F.Supp. 12, 15 (E.D.La.1976) ("the university and its officials are considered as constituting a single legal entity which cannot conspire with itself"), *aff'd*, 562 F.2d 1015 (5th Cir.1977), *cert. denied*, 439 U.S. 839, 99 S.Ct. 127, 58 L.Ed.2d 137 (1978).

[70] *Hilliard v. Ferguson*, 30 F.3d 649, 653 [93 *Ed.Law Rep.* [116]] (5th Cir.1994) (summary judgment upheld for school district where unsuccessful applicant had alleged that the district and its employees had unlawfully excluded him from employment on the basis of his status as a convicted felon).

However, if school districts or universities, or their employees, conspire with other outside entities to violate FERPA, a section 1985(3) cause of action is stated.[71] In *Brown v. City of Oneonta*,[72] the assailant of a 77-year-old woman was tracked by New York State Police to the campus of State University of New York's Oneonta campus (SUCO). Based on information that the assailant was a black male, the city police, at the request of the state police, asked SUCO's Public Safety Office for a list of all black males on campus. The request was granted after having been passed through the Assistant Director of Housing, the Director of the SUCO Computer Center, and the Vice President of Administration for SUCO. The list made its way through the city police to state police investigators who questioned the persons on the list. Among other claims, black males whose names had been released alleged violations of FERPA under section 1985(3) by school officials, city police and state police. In refusing to dismiss the conspiracy claim, the federal district court observed that "plaintiffs detail[ed] the overt acts of communication among the defendants which could reasonably lead to an inference of the formation or furtherance of a conspiracy ... in regard to the creation, approval, and release of the list."[73]

Federal Preemption

The U.S. Supreme Court has interpreted Article VI of the U.S. Constitution[74] to provide for federal preemption of state law where Congress has explicitly stated that federal law supersedes state law,[75] where Congress had not expressly declared that federal law supersedes but an actual conflict exists between federal and state law, [76] and where state common law claims would conflict with federal law.[77] Where federal law has not expressly preempted a matter, courts must determine whether state law has frustrated the purpose of the federal law.[78]

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[71] *See Rothman v. Emory Univ.*, 828 F.Supp. 537, 543 [85 *Ed.Law Rep.* [66]] N.D.Ill.1993) (student unsuccessful in section 1985(3) claims under FERPA and other theories regarding a letter from defendant's law school dean to the Illinois Board of Bar Examiners because "[a] university cannot conspire with itself, and there is not allegation in the complaint that officials of the Illinois Board of Examiners--or anyone else--joined Emory in any part of its allegedly discriminatory scheme").

[72] 911 F.Supp. 580 [106 *Ed.Law Rep.* [629]] (N.D.N.Y.1996).

[73] *Id.* at 592, 593.

[74] Laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

[75] *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (ERISA [29 U.S.C. §§ 1144(a)] which expressly "supersede[d] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ..." preempted state statute requiring employers to pay sick leave benefits to employees unable to work because of pregnancy or other occupational disabilities, but did not preempt Title VII discrimination claims.)

In *Princeton City School District, Board of Education v. Ohio State Board of Education*,[79] an Ohio appeals court determined that a statewide computer information network for public schools, Educational Management Information System (EMIS),[80] did not conflict with FERPA. The EMIS statute directed the state board of education to collect information on student participation, performance, classroom enrollment, and demographics and to prepare a report for public distribution based on the information.[81] In finding for the state board, the trial court had ruled that if the board violated the privacy provisions of FERPA the sole avenue for relief was through section 1232g. The appeals court found no conflict between the state statute and FERPA because EMIS was consistent with FERPA's purpose "to achieve a balance between the students' interest in privacy and the government's interest in evaluating a school system."[82] Both statutes expressly prohibited the reporting of personally identifiable information related to any student[83] and FERPA contained exemptions permitting release of EMIS-type information to certain officials. FERPA expressly states that education records can be released to state agencies for "improving instruction"[84] and for purposes of auditing and evaluating "any ... State supported education program."[85] In addition, EMIS does not create a situation where it would be impossible to comply with both statutes. "[E]ven if EMIS did require schools to release information in violation of FERPA ... it is still possible to comply with both. The EMIS information would be released, and FERPA would cut off federal funds. FERPA, however, would not prevent the release of the EMIS information."[86]

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[76] *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) (Florida avocado growers' claim that California state adopting percentage-of-oil test as gauge of maturity presented justiciable conflict where federal law [Agricultural Adjustment Act, 7 U.S.C. §§ 601 et seq.] had adopted a calendar test of maturity).

[77] *See, e.g., Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1959) (Enforcement of California law prohibiting importation of avocados containing less than 8 percent of oil by weight, forcing Florida growers to reship them and sell to other states, violated the interstate Commerce Clause and Equal Protection Clause).

[78] *See, e.g., CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) (lawsuit under Georgia common law causes of action following car-train collision at train crossing preempted under Federal Railroad Safety Act [45 U.S.C. §§ 421-444; 45 C.F.R. §§ 646.101- 646.220] as to speed of train where the federal government had evaluated speed in terms of class of track, but not as to adequacy of warning devices at crossings).

[79] 96 Ohio App.3d 558, 645 N.E.2d 773 [97 *Ed.Law Rep.* [473]] (1994).

[80] Ohio Rev.Code Ann. § 3301.0714 (Baldwin 1995); Ohio Admin.Code § 3301-14-01 (1995).

[81] *See* Ohio Rev.Code Ann. § 3301.0714(B)(1)(a)-(f) (Baldwin 1995). Some of the information to be collected includes:

> (a) The numbers of students receiving each category of instructional service offered by the school board .... (b) the numbers of students receiving support or extracurricular services for each of the support services or extracurricular programs offered by the school districts .... (c) Average student grades in each subject in grades nine through twelve .... (d) Academic achievement levels in grades one through eight as assessed by the locally developed competency programs .... (e) Academic achievement levels as assessed by the testing of [state] student proficiency .... (f) The number of students designated as having a handicapping condition....

Section 1983

Section 1983 is an appropriate remedy for improper release of confidential student information where the plaintiffs seeking damages are within the class of persons to be benefited by FERPA and where no comprehensive enforcement mechanism exists under which plaintiffs can find relief.[87] In *Maynard v. Greater Hoyt School District No. 61-4*,[88] parents of an autistic child sought damages as a result of circumstances surrounding an out-of-state residential placement for their son under IDEA. As required by state statute,[89] special education travel reimbursement expenses for the child's parents' expenses had been documented in the public meeting notices in the local newspaper.[90] Although the child's name or expenses had not been revealed in the public meeting notices, the cost of the child's special education had risen dramatically, necessitating a significant rise in property taxes to cover the expenses. Subsequent taxpayer inquiries concerning the reason for the tax increases resulted in a newspaper article identifying the child by name and photograph. At a subsequent school board meeting, the board explained the situation but made no changes in the child's out-of-state placement or its payment of the costs. The parents received harassing phone calls and attempts to force them from the school district. The district court in Maynard recognized that "the available sanction [under FERPA] does not provide a remedy to the plaintiffs for the alleged violation of FERPA, and in fact would serve to exacerbate the community's financial burden in providing the free, appropriate, public education required by [IDEA]."[91] In granting immunity to both the school board and the school board members, the court observed that:

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[82] *Princeton City*, 645 N.E.2d at 778.

[83] *See* Ohio Rev.Code Ann. § 3301.0714 (Baldwin 1995) ("Any data that is collected or maintained pursuant to this section and that identifies an individual pupil is not a public record for the purpose of [the freedom of information act].")

[84] 20 U.S.C. § 1232g(b)(1)(F).

[85] 20 U.S.C. § 1232g(b)(5).

[86] *Princeton City*, 645 N.E.2d at 778.

[87] *See Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir.1993).

[88] 876 F.Supp. 1104 [98 *Ed.Law Rep.* [126]] (D.S.D.1995).

[89] S.D.Codified Laws Ann. § 13-8-5 (1995).

[90] *Maynard*, 876 F.Supp. at 1108.

> An objectively reasonable school board member would not know that the release of information regarding the cause of the increase in property taxes was a violation of plaintiffs' clearly established right to confidentiality.... The decision to publish the minutes [identifying travel reimbursement for the parents] was solely an attempt to accommodate conflicting statutory requirements. The school board cannot be liable for complying with a state law which was not clearly preempted by federal law. The school board was not implementing its own policy or custom, but was enforcing the state's policy of informing constituents of expenditures.[92]

Maynard indicates that section 1983 will not be a viable cause of action where school board members release information pursuant to state law requirements. In the absence of FERPA preemption concerning the release by a school district of non-personally identifiable information, plaintiffs will have to establish existence of a policy or custom, for purposes of section 1983 liability, in some action of the board that is other than compliance with state law.

Similarly, in *Francois v. University of District of Columbia*,[93] a student was unsuccessful in his section 1983 action when the university had released his academic records to the U.S. Attorney General pursuant to a subpoena, but had failed to provide the notice required under FERPA.[94] In dismissing plaintiff's $1,500,000 compensatory and $500,000 punitive damages claims, the court found no section 1983 cause of action because plaintiff had not alleged facts, "which, if proven, would establish that U.D.C.'s alleged failure to provide notice of compliance with the subpoena was the result of a policy or custom of the University or the District of Columbia generally."[95] A section 1983 cause of action will normally not be sustainable where information over which a student and his parents have a reasonable expectation of privacy has been revealed to other persons in the educational system. In *Norris v. Board of Education of Greenwood Community School Corporation*,[96] parents of a child diagnosed with Attention Deficit Hyperactivity Disorder alleged violations of FERPA by defendants in sharing confidential information with a Local Coordinating Committee convened for the purpose of submitting an S-5 application to the Indiana Department of Education challenging the parents' request under IDEA to placement in a residential facility. Although the court took the minority view that "[s]ection 1983 does not create a private cause of action for damages where [FERPA] provides an exclusive administrative enforcement mechanism,"[97] it did recognize a separate constitutional privacy cause of action under section 1983. However, in balancing the student's legitimate privacy interest in confidential education records with the school district use of that information, the court found that, even though the information had been shared with non-school personnel, "it was within the State educational system as provided by State law."[98]

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[91] *Id.* at 1107.

[92] *Id.* at 1108.

[93] 788 F.Supp. 31 [74 Ed.Law Rep. [1085]] (D.D.C.1992).

[94] *See* 34 C.F.R. §§ 99.31(9)(i) and (ii) (an educational institution can disclose personally identifiable information "to comply with a judicial order or lawfully issued subpoena" but must make "a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.")

[95] *Francois*, 788 F.Supp. at 33.

> A student does not have a legitimate expectation that information potentially related to his educational needs will not be available within the educational system. Regardless whether the Defendants had a proper motive in bringing the S-5 proceeding, their communication of information from [the student's] records was not so broad as to violate his right to privacy.[99]

The court in *Norris* under a privacy cause of action supports the FERPA claim in *Maynard*, namely that use of student records pursuant to state or federal law cannot be the basis for a section 1983 claim.

IMPLICATIONS FOR EDUCATIONAL INSTITUTIONS

FERPA offers a number of opportunities for litigation and educational institutions must be aware of not only the requirements of FERPA, but also how that statute interacts with other federal and state laws. Access of information for non-custodial parents or a joint custody parent with whom a child is not living during the school year presents a challenge for a public school where that information must be mailed. FERPA permits an educational institution to "charge a fee for a copy of an education record which is made for the parent or eligible student,"[100] but in *Fay* the court appeared to have gone beyond the FERPA by permitting a school to charge mailing expenses for materials sent to a joint custody parent. However, FERPA conditions a charge of a fee on whether it "effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records."[101] In *Fay*, state law gave a parent access to "education information" that appeared to be a broader category than "education records" and included a host of materials given to students to take home to parents. If the parent in *Fay* had been eligible under FERPA for a copy of "education records" at no charge, would that same parent have been eligible for "education information" at no charge under state law? In elementary and secondary schools today where substantial numbers of students have divorced parents, the cost implications for schools, both in mailing charges and in administrative time to collect and assemble information to be mailed, could be significant.

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[96] 797 F.Supp. 1452 [77 *Ed.Law Rep.* [255]] (S.D.Ind.1992).

[97] *Id.* at 1465.

[98] *Id.*

[99] *Id.* at 1465-1466.

[100] 34 C.F.R. § 99.11(a).

State open records and freedom of information laws present opportunities for persons to secure information about students. Although state laws may vary, some, perhaps most, states do not automatically exclude access to personally identifiable information about students.[102] To the extent that school officials obey state law in releasing information, current case law suggests that they will not be liable under section 1983 for a FERPA violation. However, a student's or parent's federal constitutional right of privacy presents another litigation option, and one that has less well-developed case law where a public official has disclosed confidential information.[103] The practical problem for administrators, it would seem, is protecting students from those seeking student information who may have inappropriate or illegal motives. However, given the strong presumption under state freedom of information or open records laws for access to records, school administrators may have little discretion in basing access on the motives of those seeking information.[104] Clearly, requests for information under state law that raise concerns not only about FERPA, but also about the safety of students, require advice from legal counsel.[105]

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[101] *Id.*

[102] *E.g., see* Ohio Rev.Code Ann. § 149.43(A)(1) (Baldwin Supp.1996) (exempts from "public records" those "records the release of which is prohibited by state or federal law.") and *State ex rel. Grosser v. Boy*, 42 Ohio St.2d 498, 330 N.E.2d 442 (Ct.App.1975) (documents disclosing state memberships by student names, the names and grades of students, the addresses of those students, and the courses taken by students under 18 years-of-age are within "public records"); Pa.Stat.Ann. tit. 65, § 66.1 (Purdon Supp.1995) (Right to Know statute requires disclosure of information except where "personal security" involved) and *Young v. Armstrong* Sch. Dist., 21 Pa.Cmwlth. 203, 344 A.2d 738, 740 (1975) (parents organizing protest to kindergarten program entitled to names and addresses of kindergarten students; "personal security ... involves protection from personal harm rather than protection from an invasion of privacy.... [F]or records to fall within the personal security exception they must be intrinsically harmful and not merely capable of being used for harmful purposes.")

[103] *E.g., see Pesce v. J. Sterling Morton High Sch. Dist.* 201, 830 F.2d 789, 797 [42 *Ed.Law Rep.* [84]] (7th Cir.1987) (a constitutional right of confidentiality exists, but the standard to be used in balancing the individual's interest in privacy versus the public's interest in disclosure is not well-defined; the range of standards extend from a general rational purpose for disclosure to a compelling government interest).

[104] *E.g., see Young v. Armstrong Sch. Dist.*, supra note 102.

Addressing the confidentiality of special education students presents a different challenge for school officials because IDEA has its own requirements concerning disclosure of student information. Disclosure of personally identifiable information, except for its use in connection with the purposes of IDEA, requires parental consent.[106] Not only must parents consent to disclosure of student information, but they must also be notified if personally identifiable information "is no longer needed to provide educational services to the child," and then the information must be destroyed if the parents so direct.[107] State education authorities are required to extend to children the same privacy rights as parents enjoy under FERPA, taking into consideration the age of the child or severity of disability.[108] Notwithstanding a heightened degree of confidentiality under IDEA, the statute can be reconciled to standards under FERPA, state law, and the Constitution. In *M.R. v. Lincolnwood Board of Education, District 74*,[109] the use of a nonconsensual videotape in a Level II due process hearing was upheld under FERPA because the statute "permits disclosure of information to other school officials who have legitimate educational interests."[110] Likewise, state law may permit revelation of a special education student's school records to someone other than school officials, such as attorneys, where the attorneys are representing school district in administrative hearing and court proceedings.[111] In *Caroline T. v. Hudson School District*,[112] a hearing officer's decision to allow a school district to employ a court reporter to make an unofficial recording of a special education proceeding did not violate the privacy rights of the educationally disabled child or her parents, despite the parents' contention that allowing the presence of a court reporter was equivalent to release of private information about the hearing. As daunting as due process hearings can be for school administrators under IDEA, issues concerning access to student information do not appear to be significantly different than those involving FERPA.

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[105] *See Maynard*, 876 F.Supp. at 1108 (the fact that a school board sought legal counsel as to how to satisfy both FERPA and the state requirement to publish information on school district expenses which identified parents of special education student appeared to be an important factor in finding school officials immune from section 1983 liability).

[106] 34 C.F.R. § 300.571.

[107] 34 C.F.R. § 300.573 (however, an institution may maintain a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed).

[108] 34 C.F.R. § 300.574.

[109] 843 F.Supp. 1236 [89 *Ed.Law Rep.* [834]] (N.D.Ill.1994), *aff'd, Rheinstrom v. Lincolnwood Bd. of Educ., Dist.* 74, 56 F.3d 67 [100 *Ed.Law Rep.* [910]] (7th Cir.1995).

[110] M.R., 843 F.Supp. at 1239.

[111] *See Aufox v. Board of Educ. of Township High School Dist. No. 113*, 225 Ill.App.3d 444, 167 Ill.Dec. 675, 588 N.E.2d 316 [73 *Ed.Law Rep.* [188]] (1992) (court interpreted Illinois Student Records Act to permit attorneys representing school district to have access to information from school records in hearing and litigation concerning a student's placement).

[112] 915 F.2d 752 [63 *Ed.Law Rep.* [56]] (1st Cir.1990).

CONCLUSION

FERPA, despite a comprehensive set of regulations, has generated a considerable amount of litigation. The early wave of lawsuits settled the fact that a private cause of action could not be entertained under FERPA. However, sections 1983 and 1985(3) have become the current popular vehicles to challenge violations of the statute. But the new wave of litigation has become enmeshed with state freedom of information or open records laws, as well as constitutional questions about student or parent privacy. Case law suggests that liability under section 1983 can be reduced, if not eliminated, if school officials are acting with regard to student records pursuant to state law, but immunity from a constitutional privacy violation may be more problematic. Successful operation of educational institutions today requires more than knowledge about FERPA's requirements for parent or student access to records and disclosure restrictions. Education officials must view student records in a larger context of public records and privacy. Because some of these issues implicate state laws, clear resolution will probably never occur until the issues have been litigated in the various states. In the meantime, education officials will need guidance from legal counsel.

Commentary

MANAGING STUDENT RECORDS: THE COURTS AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974*

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The Supreme Court's recent decision[1] permitting recovery of monetary damages for intentional violations of Title IX of the Education Amendments of 1972[2] may encourage students to sue schools and colleges for monetary damages under other so-called Spending Clause statutes, notwithstanding that the statutes do not provide for either a private right of action or a monetary damage remedy. The Family Educational Rights and Privacy Act of 1974[3] (FERPA or the Act) holds special potential for monetary damage suits by students or their parents. It seeks to impose, by threatening withdrawal of federal funding, specific requirements on the way thousands of schools and colleges manage the educational records of millions of students. The number of records management decisions that teachers and administrators make each day

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[1] *Franklin v. Gwinnett County Public Schools*, 503 U.S. ----, 112 S.Ct. 1028, 117 L.Ed.2d 208 [72 *Ed.Law Rep.* [32]] (1992).

[2] Pub.L. No. 92-318, § 901(a), 86 Stat. 373 (1972) (codified at 20 U.S.C.A. § 1681(a) (1990)). As enacted by Congress, Title IX did not provide for a private right of action or for monetary damages. In 1979, the Supreme Court created an implied private right of action under the statute in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); and in 1992, the Court held that "a damages remedy is available for an action brought to enforce Title IX." *Franklin v. Gwinnett County Public Schools*, 503 U.S. ----, ----, 112 S.Ct. 1028, 1038, 117 L.Ed.2d 208 [72 *Ed.Law Rep.* [32]] (1992).

[3] Pub.L. No. 93-380, Title V § 513(a), 88 Stat. 571 (codified at 20 U.S.C.A. § 1232g (1990)). On the legislative history, see Senate Conference Report No. 93-1026, 93 Cong. 2d Sess., reprinted in 1974 U.S.Code Cong. and Adm.News, p. 4250. FERPA is also known as the Buckley Amendment or as the Buckley/Pell Amendment.

increases the possibility of FERPA violations. The affected students or parents, mindful of the Supreme Court's decision about Title IX, may elect to pursue individual actions for money damages instead of the administrative remedies set out in FERPA. Educators who manage student records can reduce the potential for such litigation by understanding FERPA's requirements and by becoming familiar with judicial decisions interpreting the Act's scope and application. This article reviews briefly FERPA's legislative history, purposes, and principal provisions, and calls attention to reported decisions on: (1) a private right of action under the Act, (2) FERPA violations as the basis for actions under Section 1983[4], (3) FERPA and the release of education records through discovery or by judicial order, (4) "directory information" and the release of students' names and addresses, (5) the definition of "student," "education records," and "educational institution," and (6) the constitutionality of restricting access to the records of campus law enforcement units.[5]

FERPA'S LEGISLATIVE HISTORY, PURPOSES, AND PRINCIPAL PROVISIONS

There is scant legislative history to explain FERPA's purposes or guide judicial interpretation of its meaning. Congress offered no opportunity to those affected by the Act to be heard on the merits of FERPA prior to its enactment. FERPA was not subjected to the usual process of legislative committee study and review, and there were no public hearings to receive testimony from interested institutions and individuals. FERPA originated as a Senate floor amendment to a bill extending the Elementary and Secondary Education Act of 1965.[6] Congress enacted this bill as the Education Amendments of 1974[7], which became law on August 21, 1974, and designated November 19, 1974, as the effective date of FERPA.[8]

Immediately following FERPA's enactment, educators responsible for the management of student records raised questions about its intent. They pointed out that FERPA's language was often confusing, sometimes conflicting, and completely lacking in provisions necessary to permit colleges and universities to restrict access to student recommendations obtained on the promise of confidentiality.[9] The quantity and accuracy of these criticisms quickly convinced Congress that FERPA's language was seriously flawed and required immediate amendment to clarify its meaning and to add language essential for the Act to achieve what its sponsors intended. Amendments were quickly added to legislation authorizing a White House Conference on Library and Information Services, which became law on December 31, 1974, and made the revisions to FERPA retroactive to November 19, 1974.[10] Administrative regulations for FERPA were issued by the Department of Health, Education, and Welfare on June 17, 1976.[11]

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[4] 42 U.S.C.A. § 1983 (1990).

[5] The additional records management requirements applicable to the education records of identified handicapped students in schools receiving federal financial assistance under the Individuals with Disabilities Education Act are beyond the scope of this article. *See* 20 U.S.C.A. §§ 1412(2)(D) and 1417(c) (1990), and 34 C.F.R. §§ 300.560-576 (1992).

[6] H.R. 69, 93rd Cong., 2d Sess.

[7] Pub.L. No. 93-380, 84 Stat. 484 (codified at scattered sections of 20 U.S.C.A. (1990)).

[8] FERPA was Title V, § 513(a) of The Education Amendments of 1974, Pub.L. No. 93-380, 88 Stat. 571. FERPA amended the General Education Provisions Act by adding Section 438, which is codified at 20 U.S.C.A. § 1232g (1990). The provision of the Education Amendments of 1974 fixing the effective date of FERPA was Title V, § 513(b)(1)(I).

FERPA contains no statement of its purposes and provides no rationale for the records management procedures it imposes. The Act's principal sponsor was Senator James Buckley of New York. In the absence of a full legislative history to guide them, some courts attempting to understand FERPA have referred to Senator Buckley's speech[12] explaining the Act to the Legislative Conference of the National Congress of Parents and Teachers or to his other statements[13] about the intent of the Act and the meaning of its provisions. Senator Buckley told the Legislative Conference of the National Congress of Parent and Teachers that FERPA was adopted in response to "the growing evidence of the abuse of student records across the nation,"[14] and he explained to the Senate that the purposes of FERPA were: (1) to assure parents and students of access to their educational records, and (2) to protect their rights to privacy by limiting the transferability of their educational records without their consent.[15]

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[9] *See, e.g.*, College Entrance Examination Board, Washington D.C. Office, Special Memorandum to the Membership, *The Family Educational Rights and Privacy Act of 1974--The Buckley Amendment* (November 13, 1974).

[10] Pub.L. No. 93-586, 88 Stat. 1858. On the legislative history of this statute, see House Report No. 93-1056 and Senate Conference Report No. 93-1409, 93rd Cong. 2d Sess., reprinted in 1974 U.S.Code Cong. and Adm.News, p. 6779.

[11] 41 Fed.Reg. 24622 (1976). The regulations, as amended, are codified at 34 C.F.R. §§ 99.1-99.67 (1992).

[12] Address to the Legislative Conference of the National Congress of Parents and Teachers, March 12, 1975, 121 Cong.Rec. S7974 (daily ed. May 13, 1975).

[13] Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong.Rec. 39863 (Dec. 13, 1974); Questions About and Objections to the Buckley Amendment--The Family Educational Rights and Privacy Act, 121 Cong.Rec. 13990 (Nov. 19, 1974).

[14] 121 Cong.Rec. S7974 (daily ed. May 13, 1975). See generally Russell Sage Foundation, Guidelines for the Collection, Maintenance & Dissemination of Pupil Records: Report of a Conference on the Ethical & Legal Aspects of School Record Keeping (1970).

[15] Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong.Rec. 39863 (Dec. 13, 1974).

The language of the Act confirms these two purposes. FERPA's principal restrictions are contained in its first two subsections. Subsection (a) withdraws federal funding from "any educational agency or institution" that denies, or effectively prevents, parents of students who are or have been in attendance "the right to inspect and review the educational records of their children."[16] Parents must be provided "an opportunity for a hearing ... to challenge the content of such student's education records" to insure that the records are not "inaccurate, misleading, or otherwise in violation of the privacy or other rights of students," and to "provide an opportunity for the correction or deletion" of any such information contained in the records[17]. This subsection also defines "student," "education records," and "educational agency or institution."[18] It sets out the information about a student that may be released without parental consent as "director information," requires public notice of the categories of information to be disclosed as "directory information," and grants parents the right to refuse disclosure of "directory information" without their prior consent.[19]

FERPA's subsection (b) withdraws federal funds from schools that have a "policy or practice or permitting the release of education records (or personally identifiable information contained therein other than directory information ...) of students without the written consent of their parents...."[20] This subsection permits access to education records without parental consent, subject to conditions, by school officials and teachers, certain federal and state officials, certain organizations conducting educational research, and accrediting organizations. Educational records may be released without parental consent in compliance with a lawful subpoena or judicial order, but the school must notify the parents in advance of compliance.[21] In emergencies threatening the health or safety of the student or others, access by appropriate persons without parental consent is permitted.[22]

The rights accorded parents under FERPA devolve upon the student when he or she "has attained eighteen years of age, or is attending an institution of postsecondary education ...", and schools are required to notify parents and students of their rights under the Act.[23] Responsibility for enforcement is given to the Secretary of Education, who is authorized to take actions to terminate federal financial assistance if voluntary compliance cannot be obtained and directed to establish an office within the Department of Education to investigate and adjudicate violations and complaints.[24]

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[16] 20 U.S.C.A. § 1232g(a)(1)(A) (1990).

[17] 20 U.S.C.A. § 1232g(a)(2) (1990).

[18] 20 U.S.C.A. §§ 1232g(a)(3), (4), and (6) (1990).

[19] 20 U.S.C.A. § 1232g(a)(5) (1990).

[20] 20 U.S.C.A. § 1232g(b) (1990).

[21] 20 U.S.C.A. § 1232g(b)(2)(B) (1990).

[22] 20 U.S.C.A. § 1232g(b)(1)(I) (1990).

[23] 20 U.S.C.A. §§ 1232g(d), (e) (1990).

JUDICIAL INTERPRETATIONS OF FERPA

Private Right Of Action

Courts that have examined FERPA agree that it does not explicitly or implicitly support a private right of action. Three years after FERPA was enacted, the United States Court of Appeals for the Eighth Circuit reviewed an action brought by students to force Webster College to issue them certified transcripts.[25] The college refused to issue the transcripts because plaintiffs had unpaid financial obligations from defaults on student loans. The student plaintiffs claimed, inter alia, that FERPA provided a statutory basis upon which relief could be granted, but the trial court granted the college's motion to dismiss.[26] The Eight Circuit affirmed and wrote: "The statute does not say that a private remedy is given. Enforcement is solely in the hands of the Secretary of Health, Education, and Welfare under subsection (f). Under such circumstances, no private cause of action arises by inference."[27]

The United States Court of Appeals for the Third Circuit affirmed a trial judge's decision that "[a]bsent an express congressional directive, this court declines to hold that a private litigant may enforce the mandates of FERPA in the federal courts."[28] In this case, the plaintiff was a former doctoral candidate at Duquesne University who had been expelled. His suit alleged that the University violated FERPA by abridging his right to inspect and review his educational records and by denying him the right to a hearing to request correction of the records.[29] In concluding that FERPA did not imply a private right of action, the trial judge relied on the four-pronged test the United States Supreme Court established in *Cort v. Ash*[30] for determining when a private cause of action should be implied for a federal statute that does not expressly contain one. His opinion granting summary judgment for the University said of FERPA:

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[24] 20 U.S.C.A. §§ 1232g(f), (g) (1990). The office in the Department of Education responsible for administrative enforcement of FERPA is the Family Policy and Regulations Office. 34 C.F.R. § 99.60 (1992).

[25] *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir.1977). A New York court ruled that a school regulation denying credit for work completed until all financial obligations have been paid is not inconsistent with FERPA. *Spas v. Wharton*, 106 Misc.2d 180, 431 N.Y.S.2d 638 (Sup.Ct.1980).

[26] *Girardier v. Webster College*, 421 F.Supp. 45 (E.D.Mo.1976).

[27] 563 F.2d at 1276-77.

[28] *Smith v. Duquesne University*, 612 F.Supp. 72, 80 [26 *Ed.Law Rep.* [604]] (W.D.Pa.1985), aff'd, 787 F.2d 583 [31 *Ed.Law Rep.* [422]] (3d Cir.1986).

[29] 612 F.Supp. at 79.

[30] 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975).

> [I]t is clear that FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records. The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release student records.[31]

The United States Court of Appeals for the Second Circuit decided in 1986 that there is no private right of action under FERPA. In *Fay v. South Colonie Central School District*,[32] a father with joint custody of his children under a separation agreement was denied access to his children's school records by officials in the school district the children attended while living with their mother. Fay sued the district and its superintendent, seeking injunctive relief and damages, and the Second Circuit affirmed a judgment in his favor. Fay, however, did not rely on FERPA for his cause of action. The Second Circuit, noting the Eighth Circuit's earlier decision,[33] wrote that FERPA "does not give rise to a private cause of action."[34]

The United States Court of Appeals for the Fifth Circuit has also ruled that no private right of action arises under FERPA. In 1987, in *Klein Independent School District v. Mattox*,[35] the Fifth Circuit considered a case in which a teacher and the school district that employed her filed an action for a declaratory judgment that disclosure of the teacher's college transcript by the school district would violate the teacher's privacy rights under FERPA. The case arose after the school district received a written request for access to the teacher's personnel file and the Attorney General's Office for the State of Texas advised the district's superintendent that the teacher's transcript would have to be released pursuant to the Texas Open Records Act. The trial court ruled that FERPA did not create a private cause of action and granted the defendant's motion for summary judgment.[36] The Fifth Circuit affirmed and wrote:

> "FERPA was designed to regulate the release of student records. A student's or parent's consent is required where personally identifiable information from the education records of a student is to be disclosed. The Secretary of Education is empowered to enforce the various provisions of FERPA.... An educational agency

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[31] 612 F.Supp. at 80.

[32] 802 F.2d 21 [35 *Ed.Law Rep.* [71]] (2d Cir.1986).

[33] *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir.1977). See text accompanying note 25 above.

[34] 802 F.2d at 33. See text accompanying note 41 below.

[35] 830 F.2d 576 [42 *Ed.Law Rep.* [70]] (5th Cir.1987), cert. denied, 458 U.S. 1008, 108 S.Ct. 1473, 99 L.Ed.2d 702 [46 *Ed.Law Rep.* [27]] (1988).

[36] *Id.* at 576-77.

or institution that unlawfully releases a student's record may lose federal funding.... This is the only express remedy provided in the statute. FERPA neither explicitly provides for a private cause of action, nor does its legislative history indicate that its drafters intended one."[37]

In addition to these decisions by the Second, Third, Fifth, and Eighth Circuits, trial courts in the Fifth and Eleventh Circuits have denied a private right of action under FERPA.[38]

FERPA Violations And Section 1983

Two of the federal appellate courts that have decided against a private right of action under FERPA have nevertheless recognized claims that FERPA creates a privacy interest that can be vindicated by an action under Section 1983.[39] The Second Circuit, in *Fay v. South Colonie Central School District*,[40] affirmed a judgment under Section 1983 in favor of a father who had been denied access to the school records of his children in violation of FERPA.[41] In his action for damages and injunctive relief against school officials, Fay asserted the school district's violations of FERPA as the basis for his claims under Section 1983. The school district argued that FERPA does not give rise to a cause of action either by itself or under Section 1983. The trial court, however, ruled that FERPA creates an interest that may be vindicated in a Section 1983 action, held the school district liable under Section 1983 for denying Fay access to his children's records, and awarded nominal damages.[42]

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[37] *Id.* at 579. *See also Tarka v. Franklin*, 891 F.2d 102 [57 *Ed.Law Rep.* [743]] (5th Cir.1989), *cert. denied*, 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990).

[38] *Price v. Young*, 580 F.Supp. 1 [16 *Ed.Law Rep.* [524]] (E.D.Ark.1983) (No private right of action for father of high school student denied admission to the National Honor Society seeking to challenge the use of anonymous faculty evaluations in the selection process); *Moore v. Hyche*, 761 F.Supp. 112 [67 *Ed.Law Rep.* [162]] (N.D.Ala.1991) (No private right of action for father of high school student denied admission to the National Honorary Beta Club seeking access to faculty evaluations that were basis of student's nonselection); *Tombrello v. USX Corporation*, 763 F.Supp. 541 [67 *Ed.Law Rep.* [1165]] (N.D.Ala.1991) (FERPA does not create a private right of action or preclude an employer from requesting a transcript of grades obtained by an employee in employer-funded training program).

[39] 42 U.S.C.A. § 1983 (1990).

[40] 802 F.2d 21 [35 *Ed.Law Rep.* [71]] (2d Cir.1986). See text accompanying note 32 above.

[41] 802 F.2d at 24. The Second Circuit observed that the school district "tacitly conceded liability" for violating the plaintiff's rights under FERPA. *Id.* at 33.

[42] 802 F.2d at 24-26. In an earlier case, school officials denied a father access to his son's school records. The child's mother, who had custody under their separation agreement, gave school officials a written statement saying that she did not authorize them to allow the father

On appeal and cross-appeal, the school district argued that the trial court erred in concluding that FERPA violations could be the basis of a cause of action under Section 1983, and Fay asserted error in awarding him only nominal damages for the FERPA violations. The Second Circuit decided:

> The district court correctly determined that FERPA creates an interest that may be vindicated in a section 1983 action because Congress did not create so comprehensive a system of enforcing the statute as to demonstrate an intention to preclude a remedy under section 1983.... Although FERPA authorizes extensive enforcement procedures created by regulations ... these regulations do not demonstrate a congressional intent to preclude suits under Section 1983 to remedy violations of FERPA.[43]

The court remanded the case for further proceedings to determine the amount, if any, of plaintiff's compensatory damages, saying "Fay is entitled to present evidence to support his claim for compensatory damages."[44]

The Fifth Circuit has also recognized that violations of FERPA may provide the basis for an action under Section 1983. In *Tarka v. Franklin*,[45] that court said it was faced with determining on the basis of a summary judgment record "whether as a matter of law Defendants violated section 1983 by depriving Plaintiff of his FERPA rights."[46] The plaintiff, an applicant who was denied admission to a University of Texas graduate program but allowed to audit certain courses, alleged that denial of his request to access letters of recommendation in his admission file violated his FERPA rights. The Fifth Circuit ruled, however, that FERPA did not grant the plaintiff a right to

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access to the children's school records. Notwithstanding the mother's instructions, the court granted the father's petition for access to the records, noting that FERPA protects access by either parent unless such access is barred by state law, court order, or legally binding instrument. *Page v. Rotterdam- Mohonasen Central School District*, 109 Misc.2d 1049, 441 N.Y.S.2d 323 (Sup.Ct.1981).

[43] 802 F.2d at 33.

[44] *Id.* at 34.

[45] 891 F.2d 102 [57 *Ed.Law Rep.* [743]] (5th Cir.1989). *See also Tarka v. Cunningham*, 917 F.2d 890 [63 *Ed.Law Rep.* [746]] (5th Cir.1990). In an earlier decision, the Fifth Circuit declined to reach the question of "whether FERPA, its legislative history or its regulations demonstrate a congressional intent to permit suits under § 1983 to remedy violations of FERPA." *Klein Independent School Dist. v. Mattox*, 830 F.2d 576, 580 [42 *Ed.Law Rep.* [70]] (5th Cir.1987), *cert. denied*, 458 U.S. 1008, 108 S.Ct. 1473, 99 L.Ed.2d 702 [46 *Ed.Law Rep.* [27]] (1988).

[46] 891 F.2d at 105.

access his admission file and therefore the University's denial of access did establish the deprivation of rights necessary to recover on his claims under Section 1983.[47]

A federal trial court in Arkansas held in 1991 that FERPA violations may be the basis for Section 1983 claims.[48] A woman who had been admitted to but not yet enrolled in the University of Arkansas School of Law at Fayetteville alleged that University officials violated her FERPA rights by refusing to release records of the University's investigation of a highly publicized incident of alleged sexual misbehavior by University basketball players. The court said a plaintiff may assert a FERPA violation as the basis for a claim under Section 1983, but it dismissed the complaint in this case for want of federal jurisdiction. Speaking to the plaintiff's assertion of FERPA violations, the court wrote: "Plaintiff does not allege a violation of FERPA, as the records she seeks do not pertain to her nor does plaintiff allege that she has ever attended the Fayetteville campus. Thus, plaintiff has not alleged that her FERPA rights were violated and it follows that this claim is not properly before the court."[49]

Access To Education Records By Discovery Or Judicial Order

When FERPA has been cited as a bar to the release of student records during the discovery process or by judicial order, the courts have emphasized that by its terms, FERPA does not prohibit the release of student records[50] nor is it applicable to the courts.[51] Judges have ruled that whatever the privacy interests protected by FERPA, the Act does not create a privilege, similar to the doctor-patient or attorney-client privileges, that may be invoked by a student or parents to prevent release of education records during disclosure, by subpoena, or by court order.[52] In one of the first decisions interpreting FERPA, a federal district judge wrote:

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[47] *Id.* at 105-07.

[48] *Norwood v. Slammons*, 788 F.Supp. 1020 [74 *Ed.Law Rep.* [1128]] (W.D.Ark.1991).

[49] 788 F.Supp. at 1026.

[50] *Tombrello v. USX Corporation*, 763 F.Supp. 541, 545 [67 *Ed.Law Rep.* [1165]] (N.D.Ala.1991); *Bauer v. Kincaid*, 759 F.Supp. 575, 589 [66 *Ed.Law Rep.* [1039]] (W.D.Mo.1991); *Student Bar Association v. Byrd*, 293 N.C. 594, 239 S.E.2d 415, 419 (1977). Federal officials responsible for FERPA enforcement have said that FERPA does not authorize violation of state freedom- of-information laws, and they have acknowledged that, in some circumstances, it may require school officials to choose between compliance with a state law and continued federal financial assistance. *Student Press Law Center v. Alexander*, 778 F.Supp. 1227, 1232 n. 13 [71 *Ed.Law Rep.* [1620]] (D.D.C.1991).

[51] *Sauerhof v. City of New York*, 108 Misc.2d 805, 438 N.Y.S.2d 982, 983 (Sup.Ct.1981); *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y.1977) (FERPA "does not by its terms limit discovery of school records under the Federal Rules of Civil Procedure....").

[52] *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y.1977); *Zaal v. State of Maryland*, 326 Md. 54, 602 A.2d 1247, 1255 [73 *Ed.Law Rep.* [130]] (1992) (FERPA does not "create a privilege

> It is obvious, however, that the 1974 Act does not provide a privilege against disclosure of student records. The statute says nothing about the existence of a school-student privilege analogous to a doctor- patient or attorney-client privilege. Rather, by threatening financial sanctions, it seeks to deter schools from adopting policies of releasing student records. Moreover, a school is not subject to sanctions because it discloses "personally identifiable information" if it does so in compliance with a judicial order.[53]

Even though FERPA does not apply to the courts, some judges have concluded that the privacy interests FERPA promotes should be respected when a court decides to grant or deny access to education records. One court observed: "[T]he Congressional policy expressed in this provision places a significantly heavier burden on a party seeking access to student records to justify disclosure than exists with respect to discovery of other kinds of information...."[54]

Judges have used a balancing test to determine the appropriateness of ordering the release of education records. The Court of Appeals of Maryland stated the test in these words:

> "[W]hen the issue before the court is whether to allow disclosure of education records covered by the FERPA, a trial judge, in the exercise of discretion, must conduct a balancing test in which the privacy interest of the student is weighted against the genuine need of the party requesting the information for its disclosure."[55]

Using similar tests, some courts have ordered the release of education records in civil cases. In an action alleging constitutional and statutory violations of the rights of bilingual students, a federal district court compelled defendant school officials to respond to interrogatories seeking the names, test results, bilingual identification cards, and class schedules of certain students.[56] The court believed that the plaintiffs' need for the information sought outweighed the students' privacy interests because the ability of plaintiffs to track the educational progress of individual students was

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against disclosure of student records to be invoked by the school, the student or his or her parents."). A federal trial court quashed a plaintiff's notice to take a deposition aimed at obtaining information about the defendant's medical residency program at a university. The defendant alleged that university records of his professional training were privileged under FERPA. The court ruled that FERPA did not provide a privilege under the rules of evidence, but it granted the motion to quash on other grounds. *Reeg v. Fetzer*, 78 F.R.D. 34 (W.D.Okla.1976).

[53] *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y.1977).

[54] *Id.*

[55] *Zaal v. State of Maryland*, 326 Md. 54, 602 A.2d 1247, 1256 [73 *Ed.Law Rep.* [130]] (1992).

[56] *Rios v. Read*, 73 F.R.D. 589 (E.D.N.Y.1977).

indispensable to a determination of the school district's compliance with federal law mandates on the education of students with limited English proficiency.[57]

A federal district court in Mississippi, in an action challenging procedures for placing handicapped children in special education classes, was asked to hold in contempt a Dr. Keye, the chairman of a University of Mississippi Regional Screening Team, for failing to comply with a subpoena requiring him to give testimony and produce documents related to the screening of individual students for placement in special education classes. The subpoena permitted redaction of the documents to remove all personally identifiable information. Dr. Keye failed to comply with the subpoena on grounds that plaintiffs in the case had not assured him that they had complied with the applicable provisions of FERPA. The court ruled that FERPA offered no justification for Dr. Keye's noncompliance with the subpoena because the education records sought were not to be personally identifiable and therefore were not within the ambit of FERPA.[58]

In other civil cases, those seeking access to education records have not established a need sufficient to outweigh the student's right to privacy. For example, in 1990, the United States Court of Appeals for the Third Circuit affirmed a trial court's decision refusing a newspaper publisher's request to intervene and gain access to sealed court records.[59] The records detailed a school district's request for an injunction to prevent school attendance by a fourteen-year-old handicapped student, identified as T.B., who had brought a loaded handgun to school and used it to threaten other students.[60] The Third Circuit noted that the court records contained much personally identifiable information that under FERPA could not be released by the school district. It ruled that the plaintiff's "interest in access to the records in this case clearly is outweighed by T.B.'s privacy interest and the state's interest in protecting minors from the public dissemination of hurtful information."[61]

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[57] On the obligation of school districts to provide language instruction to students with limited English proficiency see *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

[58] *Mattie T. v. Johnston*, 74 F.R.D. 498 (N.D.Miss.1976). The court noted with approval the plaintiff's argument that the obligation in FERPA to notify parents when records of their children are sought by subpoena falls on the educational agency and not on the party seeking the records. *Id.* at 502. Two courts have ordered the release of test results or other statistical data from education records after redaction of information that would identify individual students. *Naglak v. Pennsylvania State University*, 133 F.R.D. 18 [64 *Ed.Law Rep.* [413]] (M.D.Pa.1990) (statistical summary of the number of transfer students, the exams taken for transfer purposes, and sponsoring schools); *Kryston v. Board of Education, East Ramapo Central School District*, 77 A.D.2d 896, 430 N.Y.S.2d 688 (App.Div. 2nd Dept.1980) (standardized test scores of 75 elementary school students).

[59] *Webster Groves School District v. Pulitzer Publishing Company*, 898 F.2d 1371 [59 *Ed.Law Rep.* [630]] (8th Cir.1990).

[60] *Webster Groves School District v. T.B.*, No. 89-0022(C)(3) (E.D.Mo. Feb. 7, 1989). On the authority of federal courts to enjoin school attendance by violent or dangerous handicapped students see *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 [43 *Ed.Law Rep.* [857]] (1988).

A plaintiff seeking an order directing a community college to furnish him with the names and addresses of all students enrolled for a specific semester was unsuccessful. In refusing to release the names and addresses, college officials cited FERPA and stated that the college had chosen not to include the information requested in its definition of "directory information." The plaintiff gave no reason for his request and did not explain the use he would make of the names and addresses. The federal district court ruled that because he had not demonstrated any need for the names and addresses he was not entitled to court-ordered access under FERPA.[62]

The Comptroller of the State of New York asked the Board of Education of the City of New York for a list of the names of students identified as candidates for an attendance improvement and drop-out prevention program. The Board of Education refused to supply the list because the Comptroller was not among the state officials entitled under FERPA to access education records without parental consent. The relevant provision of FERPA permits access without parental consent for "[s]tate and local educational officials...."[63] The Comptroller interpreted this language as granting access to all State officials and to local education officials. The Court, however, ruled that the natural and logical interpretation of the language was that it granted an exception for state and local officials in the field of education. Accordingly, the court held that the Comptroller was not entitled to the list.[64]

Somewhat different considerations apply to the release of education records when they are sought by defendants in criminal cases. During 1992, two courts considered FERPA's application in criminal cases, in which, as one judge observed, the defendant's rights to compliance with compulsory process to discover exculpatory evidence "are of constitutional and due process dimensions."[65]] With those considerations in mind, a New York appeals court upheld a subpoena duces tecum directing a high school assistant principal to produce the names, addresses, and telephone numbers of students who were in a classroom at the time a juvenile allegedly assaulted a teacher.[66] In his concurring opinion, one Justice concluded that the "relatively modest privacy interest" created by FERPA and concomitant provisions of New York law could not defeat the defendant's right to compliance with the subpoena.[67]

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[61] 898 F.2d at 1377.

[62] *Krauss v. Nassau Community College*, 122 Misc.2d 218, 469 N.Y.S.2d 553 [14 *Ed.Law Rep.* [1081]] (Sup.Ct.1983).

[63] 20 U.S.C.A. § 1232g(b)(5) (1990).

[64] *Board of Education of the City of New York v. Regan*, 131 Misc.2d 514, 500 N.Y.S.2d 978 (Sup.Ct.1986). The court also opined that it would be feasible for the Comptroller to carry out his statutory auditing responsibilities without access to the names. *Id.* at 980.

[65] *In re Terry D.*, 182 A.D.2d 406, 582 N.Y.S.2d 681, 682 [74 *Ed.Law Rep.* [266]] (App.Div. 1st Dept.1992) (Wallach, J., concurring).

In a similar case, Maryland's Court of Appeals reversed a lower court decision denying a defendant changed with the sexual abuse of his 12-year-old granddaughter a subpoena to inspect the school records of the victim.[68] The defendant argued that examination of the records was necessary to prepare for cross examination at trial. Based on an in camera review of the records, the trial judge quashed defendant's subpoena and an intermediate appellate court affirmed.[69] The Maryland Court of Appeals concluded that the FERPA provision permitting the release of education records in compliance with a judicial order "does not mean that a student's privacy or confidentiality interest in his or her education records is automatically overridden whenever a court order to review them is sought."[70] To strike a proper balance in this case between the victim's privacy rights and the defendant's right to a fair trial, the court remanded with instructions to permit defendant's counsel access to the records, either in camera with opposing counsel or alone with court-imposed restrictions to protect confidentiality.

"Directory Information" And Students' Names And Addresses

FERPA permits a school to make public without parental consent certain "directory information" about students, including their names and addresses, if the school has given prior public notice of the categories of information it has designated as "directory information" and has provided a reasonable period of time for parents to inform the school that any or all of the designated information should not be released without their prior consent.[71] Judges have recognized this provision as establishing a significant exception to the broad confidentiality requirements imposed by the Act.[72]

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[66] As an alternative, the trial court ruled that the assistant principal could produce the persons whose names were requested at a time and place to be chosen by the attorney for the respondent. 582 N.Y.S.2d at 683.

[67] 582 N.Y.S.2d at 682 (Wallach, J., concurring).

[68] *Zaal v. State of Maryland*, 326 Md. 54, 602 A.2d 1247 [73 *Ed.Law Rep.* [130]] (1992).

[69] *Zaal v. State of Maryland*, 85 Md.App. 430, 584 A.2d 119 Md.Ct.Spec.App.1991).

[70] 602 A.2d at 1256.

[71] 20 U.S.C.A. §§ 1232g(a)(5)(A), (B) (1990).

[72] *See In re Terry D.*, 182 A.D.2d 406, 582 N.Y.S.2d 681, 682 [74 *Ed.Law Rep.* [226]] (App.Div. 1st Dept.1992); *Kastenbaum v. Michigan State University*, 414 Mich. 510, 327 N.W.2d 783, 802 [8 *Ed.Law Rep.* [444]] (1982); *Krauss v. Nassau Community College*, 122 Misc.2d 218, 469 N.Y.S.2d 553, 555 [14 *Ed.Law Rep.* [1081]] (Sup.Ct.1983).

Plaintiffs seeking access, usually pursuant to state freedom-of-information laws, to names and addresses of students have asserted that FERPA does not preclude public access because the names and addresses are "directory information" that may be disclosed without parental consent. A New York court rejected that argument in *Krauss v. Nassau Community College*.[73] The plaintiff asked for judgment ordering a community college to grant his request for the names and addresses of all students enrolled for a specific semester, asserting that the information constituted "directory information." The college responded that FERPA and its supporting regulations granted college officials the right to designate precisely what information about students would be released as "directory information," and that the college had chosen not to include their names and addresses. The court affirmed that "[w]here names and addresses have been properly designated as 'directory information,' the Buckley Amendment does not bar disclosure." In this case, however, the college "properly refused the requested disclosure pursuant to both the federal statute" and state law.[74]

The Supreme Court of New Hampshire also ruled that unless the "directory information" procedures in FERPA are properly implemented by a school, the Act does not permit public access to student names and addresses. In this case, the superintendent of a public school district refused the plaintiff's request for a list of the names and addresses of students and their parents' names. The superintendent relied on FERPA and testified that the school district had not adopted a policy regarding the release of "directory information." The trial judge denied plaintiff relief under the state's right- to-know law, and the Supreme Court of New Hampshire affirmed.[75] The school district had approved a "Special Education Plan" that permitted certain information about students, including names and addresses, to be disclosed without parental consent. But this "Special Education Plan" had been adopted without satisfying the requirements for advance public notice and parental comment that FERPA makes prerequisite to a valid "directory information" policy. Accordingly, the Supreme Court of New Hampshire ruled that the trial judge correctly concluded that the superintendent did not violate either school policy or FERPA by refusing to release the list.[76]

"Student," "Education Records," and "Educational Institution"

The courts have applied but not expanded the definitions in FERPA of the words "student," "education records," and "educational institution." Two federal courts, for example, have rejected attempts to broaden the meaning of the word "student." In a per curiam opinion, the United States Court of Appeals for the Fifth Circuit affirmed a judgment against an applicant seeking access to letters of recommendation in his admission file at the University of Texas.[77] The plaintiff was denied admission to a graduate program but was permitted to audit several classes. He alleged that he was therefore a "student" of the University entitled under FERPA to access his admission file. The Fifth Circuit noted that the legislative history of the Act suggested that auditing students were entitled to some protection, but it ruled that "a rejected applicant who receives permission to audit a course does not have the right to access admission information which is afforded to a student in attendance."[78]

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[73] 122 Misc.2d 218, 469 N.Y.S.2d 553 [14 *Ed.Law Rep.* [1081]] (Sup.Ct.1983).

[74] *Id.* 469 N.Y.S.2d at 555.

[75] *Brent v. Paquette*, 132 N.H. 415, 567 A.2d 976 [57 *Ed.Law Rep.* [1309]] (1989).

[76] Michigan State University compiled and published a directory of students during the fall of 1978 after giving students an opportunity to withhold their names. Relying on FERPA, the University later denied a request from a student political organization for a copy of the computer tape used to produce the directory. An intermediate appeals court, relying on Michigan law and not on FERPA, denied plaintiffs access to the tape, and the Supreme Court of Michigan affirmed by an equally divided court. *Kastenbaum v. Michigan State University*, 414 Mich. 510, 327 N.W.2d 783 [8 *Ed.Law Rep.* [444]] (1982).

Citing that Fifth Circuit decision, a federal district court in Arkansas held that under FERPA, the word "student" does not include a person who has not been in attendance at the educational institution in question. Noting that plaintiff did not allege that she ever attended the school from which she was seeking records that did not pertain to her, the court wrote that "plaintiff, as a non-student, is not within the class of persons to which FERPA is applicable...."[79]]

The Supreme Court of Washington decided that the "education records" to which FERPA applies are the records of students, not records relating to teachers.[80] The court held that FERPA did not bar release of records in possession of the Superintendent of Public Instruction detailing the reasons for teacher certificate revocations. A publishing company sought the records of revocations for a series of investigative articles on teacher sexual misconduct with students. The trial court ordered release of the records with certain deletions to protect the privacy of any student victims of teacher sexual misconduct, and the Supreme Court of Washington affirmed, rejecting the Superintendent of Public Instruction's argument that the records were protected by FERPA.[81]

In a similar case, the United States Court of Appeals for the Fifth Circuit ruled that FERPA did not preclude release pursuant to a state law of a teacher's college transcript by the school district in which she was employed.[82] The court concluded that the teacher "is not a 'student' and her college transcript is not an 'education record' protected from disclosure pursuant to FERPA's provisions."[83]

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[77] *Tarka v. Franklin*, 891 F.2d 102 [57 Ed.Law Rep. [743]] (5th Cir.1989).

[78] *Id.* at 107.

[79] *Norwood v. Slammons*, 788 F.Supp. 1020, 1028 [74 Ed.Law Rep. [1128]] (W.D.Ark.1991). See text accompanying note 48 above.

[80] *Brouillet v. Cowles Publishing Company*, 114 Wash.2d 788, 791 P.2d 526 [60 *Ed.Law Rep.* [638]] (1990).

[81] *Id.* 791 P.2d at 533.

[82] *Klein Independent School District v. Mattox*, 830 F.2d 576, 579 [42 *Ed.Law Rep.* [70]] (5th Cir.1987), *cert. denied*, 458 U.S. 1008, 108 S.Ct. 1473, 99 L.Ed.2d 702 [46 Ed.Law Rep. [27]] (1988). See text accompanying note 35 above.

An Arkansas trial court denied a newspaper publisher access to records of the Arkansas Intercollegiate Athletic Conference (AIC) showing the amount of money member institutions disbursed to student athletes during the year by holding that they were "education records" required to be closed under FERPA and state law. But the Supreme Court of Arkansas reversed and ruled that: "The AIC is not an educational agency or institution subject to the authority of the Federal Commission of Education as defined by the act, § 1232g(a)(3), and is not subject to the act."[84]

The United States Court of Appeals for the Fifth Circuit ruled that a student's right under FERPA to a hearing to challenge inaccurate information in his or her "education records" "precludes a cause of action whose purpose is to challenge, except for ministerial error, the grade assigned to a student."[85] The court found that Congress could not have intended FERPA to afford students a federal right to challenge their teachers' or schools' grading process.

The United States Court of Appeals for the Eleventh Circuit decided that the American College Testing Program (ACT) is not an "educational institution" within the meaning of FERPA.[86] As a part of its investigation of a high school student's ACT test scores, ACT asked the student to submit a copy of his high school transcript. The student refused, and ACT later decided to cancel his ACT test scores because of suspected cheating. In his federal civil rights action against ACT, the student alleged that ACT's request for his transcript violated his FERPA rights. The Eleventh Circuit affirmed the trial court's grant of summary judgement in favor of ACT and noted "ACT is not an 'educational institution' within the meaning of" FERPA.[87]

Challenges To FERPA's Constitutionality

During 1991, two federal district courts considered constitutional challenges to FERPA's restrictions on the release of personally identifiable information about students in campus crime reports. At that time, FERPA provided that records of campus law enforcement units were not "education records" if: (1) the law enforcement unit did not have access to education records, and (2) the records of the law enforcement unit were kept separate from all education records, and (3) the records of the law enforcement unit were maintained solely for law enforcement purposes, and

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[83] *Id.* at 579.

[84] *Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.2d 258, 260 (1981), appeal dismissed and *cert. denied*, 455 U.S. 931, 102 S.Ct. 1416, 71 L.Ed.2d 640 (1982).

[85] *Tarka v. Cunningham*, 917 F.2d 890, 891 [63 *Ed.Law Rep.* [746]] (5th Cir.1990).

[86] *Langston v. ACT*, 890 F.2d 380 [57 *Ed.Law Rep.* [373]] (11th Cir.1989).

[87] *Id.* at 387 n. 12.

(4) the records of the law enforcement unit were not made available to anyone other than law enforcement officials of the same jurisdiction.[88]

In *Bauer v. Kincaid*,[89] a university student at Southwestern Missouri State University (SMSU) brought a declaratory judgment action seeking access under the Missouri Sunshine Law to the criminal investigation and incident reports maintained by the SMSU Safety and Security Department. University officials responded that under FERPA release of the reports would subject the University to the loss of federal funding. They interpreted the relevant language of FERPA to mean that if the criminal investigation reports were released to anyone other than local law enforcement officials, the reports would thereby become "education records" and the University would be subject to sanctions for improper release.[90] The plaintiff, a student journalist, submitted that FERPA specifically exempted the reports of campus law enforcement agencies and, alternatively, that if FERPA imposed a penalty for release of the reports, it violated her First Amendment rights.

The federal district court held that "the records sought by plaintiff are not educational records the release of which could result in a loss of federal funding under FERPA."[91] In addition, the court decided:

> [D]efendants' actions in withholding the criminal investigation and incident reports which contain names and other personally identifiable information, is [sic] unconstitutional under the equal protection guarantee of the Fifth Amendment due process clause and under the First Amendment.[92]

The court's equal protection ruling was based on its conviction that if FERPA imposed a penalty for disclosure of personally identifiable information about students in campus crime reports, it created an irrational classification by protecting the names of student suspects, victims, and witnesses, and denying protection to the names of non-student suspects, victims, and witnesses. The First Amendment ruling was grounded in plaintiff's constitutional right, not as a journalist but as a member of the general public, to receive "full and complete information regarding the affairs of government and the official acts of those who represent them."[93]

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[88] 20 U.S.C.A. § 1232g(a)(4)(B)(ii) (1990).

[89] 759 F.Supp. 575 [66 *Ed.Law Rep.* [1039]] (W.D.Mo.1991).

[90] *Id.* at 591.

[91] *Id.*

[92] *Id.* at 593.

[93] *Id.* at 594. The court's analysis of the First Amendment's application to FERPA has been rejected by another federal trial court. *Norwood v. Slammons*, 788 F.Supp. 1020, 1027 [74 *Ed.Law Rep.* [1128]] (W.D.Ark.1991).

The public's First Amendment right to receive information was also a basis for the decision in *Student Press Law Center v. Alexander*.[94] In this case, student journalists won a preliminary injunction to prevent federal officials responsible for administrative enforcement of FERPA from withdrawing or threatening to withdraw federal funding from educational institutions that release to the public personally identifiable information about students in campus crime reports. The case arose after several universities cited FERPA as the basis for discontinuing their former practices of allowing public access to campus crime reports containing information about students. University officials acted after receiving a "technical assistance" letter from the Department of Education explaining the application of FERPA to campus crime reports and threatening loss of federal funding. Plaintiffs asserted that FERPA violated their First Amendment rights by interfering with their ability to gather information regarding campus crimes. The court held that plaintiffs had a substantial likelihood of success on the First Amendment claim.

> Defendants have not offered a single justification for preventing universities from disclosing the names of students involved in criminal activity. The Government apparently takes the position that FERPA's imposition on the right to receive information is minimal, and therefore requires no justification. That position is untenable even in an area of limited constitutional protection. In light of the universities' unwillingness (absent coercion to the contrary) to release campus crime reports in full, the Government must assert some interest that outweighs the public's First Amendment right to receive information.[95]

Subsequent to these two decisions, Congress, acting on the recommendation of Secretary of Education Lamar Alexander, amended FERPA's restrictions on campus crime reports. The new language, which became effective July 23, 1992, provides that the term "education records" does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."[96]

SUMMARY AND RECOMMENDATIONS

Administrators and teachers who manage education records can ensure compliance with FERPA by knowing both the details of its requirements and the import of reported decisions applying those requirements in specific factual contexts. The extant case law holds that FERPA does not either explicitly or implicitly support enforcement through a private right of action. Nevertheless, the United States Supreme Court's decisions creating a private right of action and a damages remedy under Title IX may renew efforts to establish through litigation a cause of action for damages directly under FERPA. In the meantime, several federal courts have already recognized that the privacy interests created by FERPA are actionable under Section 1983, thus affording parents or students who allege FERPA violations an opportunity to sue schools in federal court for both injunctive relief and money damages. Successful plaintiffs may be awarded attorney's fees.

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[94] 778 F.Supp. 1227 [71 *Ed.Law Rep.* [794]] (D.D.C.1991).

[95] 778 F.Supp. at 1234.

[96] The Higher Education Amendments of 1992, Pub.L. No. 102-325, Title XV, § 1555, 106 Stat. 448 (1992) (to be codified at 20 U.S.C. § 1232g(a)(4)(B)(ii)). The Department of Education is preparing the necessary changes in the FERPA regulations.

The corpus of case law suggests that schools can reduce their exposure to damage claims based on FERPA violations by devoting special attention to full compliance with FERPA provisions that govern: (1) access to educational records by parents who have been separated or divorced, (2) notification to parents before educational records are released in compliance with a subpoena or judicial order, (3) designation and release of "directory information," and (4) release of records created by law enforcement units. One of the FERPA problems most likely to arise in schools below the collegiate level is the correct application of the Act to parents who have been separated or divorced. Damages and other relief have been awarded to parents improperly denied access to their children's educational records because of their marital status.[97] Judges also have expressed concern that parents be notified of subpoenas or other judicial orders directing the release of educational records before the records are released. FERPA requires schools to provide the notification. Notification should be given promptly in every instance because, under some circumstances, parents may be entitled to be heard in court before the records are released.[98] The courts likewise expect schools that elect to release "directory information" about students to have complied with the FERPA provisions that require an advance parental notification of the details of the "directory information" policy and an opportunity for parents to notify the school that they do not want "directory information" released without their prior consent. The school's records management system must be organized to enforce these parental refusals during future releases of "directory information." Finally, schools must be aware of the recent change in FERPA's restrictions on the release of records created by campus law enforcement units.

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[97] See note 42 above and accompanying text.

[98] *See Rios v. Read*, 73 F.R.D. 589, 600 (E.D.N.Y.1977); *Mattie T. v. Johnston*, 74 F.R.D. 498, 501 (N.D.Miss.1976); *Sauerhof v. City of New York*, 108 Misc.2d 805, 438 N.Y.S.2d 982, 983 (Sup.Ct.1981).

E. OUTLINES AND MEMOS

1. Memo re: "Final Rule Regarding Information and Access by Military Service (Solomon Amendment)," by Annette R. Wilson.
2. "Student Affairs Overview," by Nancy Footer.
3. "Critical Issues Related to FERPA," by Karen J. Stone.
4. "Current Issues under FERPA," by Cary M. Jensen.
5. "Current Issues under the Family Educational Rights and Privacy Act, by Barbara L. Shiels.
6. "Family Educational Rights and Privacy Act," by LeRoy S. Rooker.

MEMORANDUM

DATE: December 1, 1998

FROM: Annette R. Wilson
Special Assistant to the President/General Counsel

RE: **Department of Defense (DOD) Final Rule Regarding Information and Access by Military Service (Solomon Amendment)**

Background

On April 8, 1997, the DOD published an interim rule, effective on March 29, 1997, regarding institutions of higher education providing to the military service information and access to students. On October 23, 1998, the DOD published the final rule (32 CFR Part 216; http://www.cphe.org/mil-recru.htm). This memo will answer the common questions about the final rule as it applies to SCSU.

Final Rule

1. When is it effective?

October 23, 1998.

2. What does it generally require?

For compliance, SCSU must not have an anti-ROTC policy and must not prohibit the military service from obtaining entry to campuses, access to students and access to information on students for military recruiting purposes (32 CFR 216.2). The main focus of this document, since SCSU does not have an anti-ROTC policy nor prohibit access to students by military recruiters, is the provision of student recruiting information.

3. About what students does SCSU have to provide student recruiting information?

SCSU should provide student recruiting information on enrolled individuals who are 17 years of age or older {32 CFR 216.3(e)}. (See also Question 5, herein.)

Enrolled is defined as registered for at least one credit hour of academic credit during the most recent term, the current term or the next term {32 CFR 216.3(f). Although the final rule is unclear as to whether summer sessions are to be considered as terms, realistically, I believe the military service will make requests with regard to specific semesters or summer sessions and we will be able to tell exactly what term enrollment information to provide.

4. What is student recruiting information?

Student recruiting information is the student's name, local address, telephone listing, age (or year of birth), level of education (freshman, sophomore, etc., or degree awarded for recent graduate), and major {32 CFR 216.3(c)}.

This is changed slightly from the interim rule which also required place of birth, degrees received (which could have included all degrees received before attendance at SCSU) and the educational institution in which the student most recently was enrolled.

5. If student recruiting information is requested by the military service, does SCSU have to provide it all for every enrolled student for the applicable term?

No, if:

a. the student is not yet 17 {32 CFR 216.3(e)}

(Note: According to William Carr, DOD, if we cannot efficiently separate data based on age, we can provide information on students who are not yet 17 as long as it is consistent with our definition of directory information under the Family Educational Rights and Privacy Act of 1974, as amended (FERPA) (20 U.S.C. 1232g) and a request for non-disclosure has not been filed)

b. we certify that the information is not maintained by the institution {32 CFR 216.4© (4)}

c. we certify that we already provided the information to the military service for that semester or "other academic term" (I believe this may be interpreted as a summer session).
{32 CFR 216.4(c)(4)}

d. we certify that the student has formally requested us to withhold this information from third parties {32 CFR 216.4(c)(5)}. This is the non-disclosure request under FERPA. A student may not elect to have information withheld only from the military service.

6. Do we provide all the student recruiting information even if we have not designated items of it as directory information under FERPA?

Yes, the Department of Education has taken the position that to do so would not violate FERPA; however, because the Minnesota Government Data Practices Act (MGDPA) (Minn. Stat. 13.22) also governs educational data, we would best be protected by adding all items to our directory information. Note that age or year of birth are listed in the alternative in the final rule {32 CFR 216.3(c)}; therefore, we would not have to designate both as directory information.

7. What is the "military service"?

The military service refers to the Army, Navy, Marine Corps, Air Force and Coast Guard, including their Reserve or National Guard components (32 CFR 216.2). Each branch of military service (i.e., Navy, Army, etc.) can ask for student recruiting information during one semester or summer session; however, we must release student recruiting information only to one office of each branch. Therefore, if the Anchorage office of the Navy requests student recruiting information and the St. Cloud office of the Navy asks for the same student recruiting information during the same semester or summer session, we must release it only to one office. If the second requesting office asks for different student recruiting information, we must release that.

8. Can we charge for providing the student recruiting information?

Yes, we may charge for actual costs provided that the charges are reasonable and customary. We must explain to the military recruiter, within 15 calendar days, our method for determining the cost and our basis for concluding that such charges are reasonable and customary {32 CFR 216.4(e)}. Although not required by the final rule, I recommend that the explanation be in writing and include the date of the request so that we can prove we were in compliance and within the time frame.

9. What if the military service wants the student recruiting information in a particular format, i.e., on labels or on computer disk?

Nothing in the final rule requires us to provide it in a particular format; however, if the requested method is more expensive, we may choose to explain the cost of the more traditional format versus the cost of the requested format and let them choose.

10. How soon do we have to comply with a military service request for student recruiting information?

The final rule requires that the information be provided within a reasonable time period, normally 30 days {32 CFR 216.5(b) (1) (ii)}.

11. What if SCSU does not comply with the final rule?

We risk losing federal funding {32 CFR 216.4(a) and (b)}.

General Advice

A. Make sure all items of student recruiting information are designated as directory information under FERPA.

B. Get all requests from military service in writing and maintain them separately from other requests for public information. This allows us:

1. to determine exactly what information is sought and for what time period
2. to determine if a previous request has already been received and responded to within the semester or other academic term

3. to ensure that we explain charges in writing within 15 calendar days and that we respond to the request within a reasonable time period

C. Release only what information we legally can. Examine the request. If it is for information that has been designated student recruiting information and that is not exempted under Question 5 herein, then release it. If it is for information that is not designated as student recruiting information but that is designated as directory information under FERPA (i.e., degrees and awards received, participation in officially recognized activities and sports), then release it for students who have not filed a request for non-disclosure. If it is for information (i.e., race) that is not designated as student recruiting information and is not designated as directory information under FERPA, then don't release it.

D. Try to get payment for the information before releasing it.

Conclusion

The Department of Defense contact person is William J. Carr (703-697-8444).

STUDENT AFFAIRS OVERVIEW

June 21-24, 1998

Nancy S. Footer
Bowling Green State University
Bowling Green, Ohio

I. FAMILY EDUCATIONAL RIGHTS & PRIVACY ACT

The Family Educational Rights & Privacy Act, 20 U.S.C. 1232g and 34 CFR Part 99, also known as FERPA or the Buckley Amendment, was enacted on August 21, 1974. Congress passed it in response to a growing public awareness about government record keeping and the dissemination of information commonly considered private in nature. It provides rights of inspection and prohibitions against unauthorized dissemination of educational information and applies to elementary, secondary, and post secondary educational agencies.

II. TO WHOM DOES THE ACT APPLY?

The act applies to all public and private institutions of higher education that receive funds made available under programs administered by the Department of Education, including federal grant monies, Pell grants, Guaranteed Student Loan Programs and other such funds. If an institution receives funds under one or more such programs, the regulations apply to the recipient as a whole, including each component or department within the institution. In other words, most institutions of higher education, whether public or private, fall under FERPA regulations.

III. DEFINITIONS

Important definitions to keep in mind include:

A. Student - any individual who is or has been in attendance at an institution and about whom the institution maintains education records. Eligible students are those who are 18 years of age or older. This definition does not include applicants to an institution.

B. Parent - parent of a student, including natural parent, guardian, or an individual acting as a parent in the absence of a parent or guardian.

C. Attendance - attendance in person or by correspondence. This definition also includes that period of time during which a student might be working under a work-study program. Note that it is not enough to be enrolled, the student must be physically present at the institution except in cases involving correspondence courses.

D. Disclosure - to permit access to or the release, transfer, or other communication of personally identifiable information contained in educational records to any party by any means, including oral, written, or electronic means.

E. Personally identifiable information - student's name, parent and family member names, address of student and parent or family members, a personal identifier such as social security number or student number, a list of personal characteristics or other information which would make the student's identity easily traceable.

F. Directory information - information contained in education records which would not generally be considered harmful or an invasion of privacy if released. Specific examples include student name, address, telephone number, date and place of birth, major field of study, participation in recognized activities and sports, weight and height of athletes, dates of attendance, degrees and awards received, and the most recent previous educational institution attended.

G. Record - any information recorded in any way, including but not limited to, handwriting, print, computer, media, video, or audiotape, film, microfilm or microfiche.

H. Education records - those records that are directly related to a student that are maintained by an educational institution. Education records do not include:

a. Records of instructional, supervisory, and administrative personnel that are kept in the sole possession of the maker of the record and are not revealed to anyone except a substitute. Example: grade books and faculty instructional materials.

b. Records of a law enforcement unit of an educational institution if the records are maintained separately from education records, maintained solely for enforcement purposes, and disclosed only to law enforcement officials of the same jurisdiction.

c. Records relating to an individual who is employed by an educational institution that are maintained in the normal course of business, related solely to the individual as an employee, and are not available for any other purpose. Exception: records of an individual who is employed by the educational institution as a result of his or her status as a student are educational records and are not excepted from coverage under this section. Examples include employment records of research and teaching assistants.

d. Records that contain information about an individual after he or she is no longer a student at the institution.

e. Records of a student that are made or maintained by a physician, psychologist, psychiatrist, or other recognized professional or paraprofessional acting in such capacity which are made or used only in connection with treatment of the student and are disclosed only to persons providing the treatment. Treatment does not include remedial educational activities or activities that are part of the program.

IV. RIGHTS OF INSPECTION AND REVIEW

A. FERPA provides that an institution must allow an eligible student to inspect and review his or her educational records. The educational agency must provide the records no later than 45 days after requested. The institution must respond to reasonable requests for explanations and interpretations of the records. And, you may not destroy records if there is an outstanding request for inspection. Records not subject to review include:

a. financial records of the parents; and

b. confidential letters and statements of recommendation if the student has waived the right to review and inspect these documents and the letters are related to the student's admission, application for employment, or receipt of an honor or honorary recognition. The waiver is valid only if it is not a condition of admission to or receipt of a benefit or service from the institution, it is in writing and signed by the student. If the student provides such a waiver, the student shall receive, upon request, the names of the persons providing the recommendations, and the institution shall not use the letters for any purpose other than for which they were originally intended. The student may revoke the waiver in writing; however, revocation only affects documents received after the date of the revocation., In other words, a student may not revoke the waiver in order to see documents already received.

B. If a student believes that his or her education records contain inaccurate or misleading information or information which violates the student's right to privacy, the student may request that the institution amend the records. If the institution does not agree, it shall inform the student in writing and advise the student of the right to a hearing. If, as a result of the hearing, the institution agrees with the student, it shall amend the record and notify the student in writing. If the institution does not agree, it shall advise the student that he or she may place a written statement in the file contesting the information. If the student chooses this option, the statement must be maintained with the contested information and disclosed in conjunction with any release of the contested information.

If you do conduct a hearing, it must at a minimum contain the following elements:

a. hearing must be held within a reasonable time after request;

b. student will be provided reasonable notice of the date, place and time;

c. individual conducting the hearing must not have a direct interest in the outcome;

d. student must have a fair opportunity to present case and may be assisted by an attorney;

e. the decision must be in writing and rendered within a reasonable time after the hearing. It must be based solely on the evidence presented at the hearing and must include a summary of the evidence and the reasons for the decision.

C. The courts have ruled that FERPA does not provide a means by which a student may obtain information on how a particular grade was assigned. "At most, a student is only entitled to know whether or not the assigned grade was recorded accurately in the student's record." *Tarka v. Cunningham*, 741 F. Supp. 1281 (W.D. Tex. 1990).

V. DISCLOSURE OF RECORDS

A. Lawful disclosures of educational records generally take one of three forms - they are to the student; to a person or entity with the written consent of the student; or they fit within the regulatory definition of records that may be disclosed without the prior consent of the student.

B. Information which may be released without the student's prior consent includes:

a. directory information, unless the student has requested in writing that all or any portion of those items designated as directory information not be disclosed;

b. disclosures to internal university officials who have a legitimate educational interest in the information. Note that an institution must define university officials and legitimate educational interest in its annual notification.

c. disclosures to another educational institution where the student seeks or intends to enroll;

d. disclosures to authorized representatives of the Comptroller General of the U.S., the Secretary of Education, or state and local educational authorities;

e. disclosure is in connection with financial aid which the student has applied for or received, if the disclosure is for the purpose of determining eligibility, amount or conditions of aid, or to enforce the terms and conditions of the aid;

f. disclosures to state and local officials to whom the information may be made available under certain statutes;

g. disclosures to organizations conducting studies for or on behalf of educational agencies to develop, validate or administer predictive tests, student aid programs, or improve instruction;

h. disclosures to accrediting agencies to carry out accrediting functions;

i. disclosures to parents of a dependent student, as defined by the Internal Revenue Code;

j. disclosure is to comply with a lawfully issued subpoena or court order. The institution must make a reasonable effort to inform the student in advance of compliance unless the subpoena or court order expressly states that providing prior notice would compromise the confidentiality of an investigation or other legal proceeding. The institution may disclose education records without benefit of subpoena or court order during litigation initiated by the institution against a parent or student;

k. disclosure in the event of an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals;

l. disclosures of the results of disciplinary proceedings conducted by the institution against the alleged perpetrator of any violent crime to the alleged victim;

m. disclosures to the parent of a student under 18 or to the student.

C. If the request does not fit into one of the categories described above and is not to the student, you must obtain the student's consent prior to disclosing the records. The consent must be in writing, stating the date, the records to be released, the purpose of the disclosure, and the party to whom the disclosure may be made.

D. FERPA does not forbid or require an institution to disclose the personally identifiable information listed above unless it is at the request of a student or parent of a student younger than 18. Of course, release of information in a manner inconsistent with FERPA can lead to the loss of all federal funds from your institution.

E. An educational institution has a duty to record and maintain each request and release of personally identifiable information from a student's educational records except when the request is received from an institution official, a parent or eligible student, a person with written consent, or when the request is for directory information.

F. Redisclosures of information released are generally prohibited without the prior consent of the student. Institutions have an obligation to inform the party to whom the disclosure is made of this prohibition unless the information was disclosed pursuant to a court order or subpoena, is directory information, or was to a parent or student.

G. A student's privacy rights under FERPA terminate upon death.

VI. ANNUAL NOTIFICATION OF RIGHTS

FERPA requires that each institution annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act.

The notice must inform parents or eligible students that they have the right to -

A. Inspect and review the student's education records;

B. Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

C. Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act authorizes disclosure without consent; and

D. File a complaint with the Department of Education concerning alleged failures by the educational agency or institution to comply with the requirements of the Act.

The notice must include all of the following:

A. The procedure for exercising the right to inspect and review education records;

B. The procedure for requesting amendment of records;

C. If the educational agency or institution has a policy of disclosing education records internally, a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

This notice must be made by means that are reasonably likely to inform the parents or eligible students of their rights. It must also be calculated to effectively notify parents or eligible students who are disabled. A model notification of rights may be found at 61 Fed. Reg. 59298 (Nov. 21, 1996).

VII. ENFORCEMENT

A. The Department of Education is authorized to investigate and review potential violations and to provide technical assistance regarding compliance issues.

B. In the event that the office determines that a complaint is meritorious, the office shall recommend steps necessary to insure compliance with the act and provide a reasonable time for an institution to come into compliance.

C. If an institution does not come into compliance, the department is authorized to terminate all or any portion of the institution's federal funds.

D. Courts have typically held that there is no private right of action under FERPA. *Girardier v. Webster College*, 563 F. 2d 1267 (8th Cir. 1977) and *Smith v. Duquesne University*, 612 F. Supp. 72 (W.D. Pa. 1985).

VIII. COMMON CONCERNS AND RECENT DEVELOPMENTS

A. Public Records Laws - For those of you in public colleges and universities, it is very important that you understand how your state's public records act interacts with FERPA. Some states have incorporated FERPA into their acts by clearly stating that records protected by FERPA are exempt from the public records laws. Others merely provide a "kitchen sink" exception, stating that records which are confidential under federal law are exempt from disclosure. The "kitchen sink" language can be problematic, as was demonstrated in the Miami

University case cited below. For an excellent discussion of this topic, I encourage you to read Barbara Shiels' outline, Current Issues under the Family Educational Rights and Privacy Act, NACUA Annual Conference, June 18-21, 1997.

B. Student Disciplinary Records - The Ohio Supreme Court ruled in *State ex rel. The Miami Student v. Miami University*, 680 N.E. 2d 956 (Ohio 1997), that FERPA does not protect student disciplinary records from disclosure under the Ohio Public Records Act. The ruling placed Ohio public universities squarely at odds with FERPA, a fact not entirely lost on the Department of Education. In January 1998, the Department of Justice filed U.S. v. The Miami University, et al., (No. C-2-98-0097). The Federal District Court subsequently entered a preliminary injunction preventing Miami University and Ohio State University, the only parties to the action, from "releasing any student disciplinary records which contain personally identifiable information" as set forth in FERPA. This case bears watching.

C. Grade Posting - The life of a college and university attorney can be made measurably better if your institution does not post grades. Unfortunately, the convenience of your students and faculty will prevail when this issue rears its head. You should advise your institution not to post grades by social security number or any part thereof, student identification number, name, or any other personal identifier unless you have the express written consent of the student. You can, of course, post grades by any method you wish with student consent. Consent may be obtained in any number of creative ways - by writing it into the exam questions on a computer generated exam, by signing a statement on the first or last page of a blue book, or by executing a consent form which may be torn off the syllabus and returned to the faculty member at the first class. You may also post grades by use of a code name or number known only to the student and faculty member as is done at many graduate schools.

D. Subpoenas and Court Orders - Review a subpoena or court order that you receive very carefully. In fact, make sure your campus colleagues understand that subpoenas should be referred to legal counsel upon receipt so that you can insure their validity prior to compliance. Out of state subpoenas are typically not enforceable unless made so under your state rules, likewise with out of state federal subpoenas. Attorneys often direct subpoenas to the registrar's office, which is designed to get them only the official student file. You should comply accordingly. Smart attorneys know to make a broad request, sometimes sending subpoenas to several offices, a method designed to obtain all records your institution maintains on a student. Do not forget to comply with the requirement to notify the student of the subpoena unless otherwise instructed to so on the face of the subpoena. This provision is designed to give the student a reasonable opportunity to quash the subpoena or order.

E. Record keeping - It will serve you well over the long haul if you come to understand the record keeping system at your institution. Do not be surprised to find out, however, that no real system exists outside the registrar's office. I recommend that in your spare time you conduct a small audit, asking to see a few graduate and undergraduate academic files, student discipline files, student employment files, etc. Do not neglect to seek out files in college and department offices, particularly for graduate students. I suspect you will find all kinds of items tossed into files that have no business there. You will certainly find at least one memo written by a dean or chair asking to dismiss several graduate students for violating some academic policy. This memo, containing information about several students, will have found its way into each student's file. At least one of these students, disgruntled by his or her dismissal from the program, will have asked to see his or her file. This student will now know intimate and private academic details about one or more other students. From this you will learn to caution your colleagues to write one memo about each student being disciplined; it may waste paper, but it's worth it. From this you may also be inspired to come up with a protocol, system, policy, or other form of guidance to help your institution come to grips with all the paper floating around.

CRITICAL ISSUES RELATED TO FERPA

STETSON UNIVERSITY COLLEGE OF LAW
19TH ANNUAL NATIONAL CONFERENCE ON
LAW AND HIGHER EDUCATION
February 1998

Karen J. Stone, General Counsel
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Jacksonville, Florida

INTRODUCTION

The Family Educational Rights and Privacy Act (FERPA), more commonly known as the "Buckley Amendment" was enacted by the United States Congress in 1974, arising out of New York Senator James Buckley's concern with the misuse and abuse of student records, particularly at elementary and secondary schools.[1]

On June 17, 1976, the Department of Health, Education and Welfare issued the initial final regulations in the *Federal Register* for the Family Educational Rights and Privacy Act of 1976 (P.L. 93-568, Sec. 2), as amended (P.L. 93-568, Sec. 2; 20 U.S.C. 1232g). When the Department of Education was established, the implementing regulations were transferred to the Department of Education and codified in Part 99 of Title 34 of the *Code of Federal Regulations*. The primary source of legislative history regarding FERPA is contained in the "Joint Statement in Explanation of Buckley/Pell Amendment," Volume 120 of the Congressional Record, pages 39862-39866.

I. PURPOSE AND REQUIREMENTS OF FERPA

"The purpose of the Family Educational Rights and Privacy Act is to afford certain rights to students concerning their education records. The primary rights afforded are the right to seek to have the records amended and the right to have some control over the disclosure of information from the records."[2]

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[1] Complying With Federal Law: A Manual For College Decision Makers, Kent M. Weeks, 1993.

[2] Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended, Revised 1995 Edition, American Association of College Registrars and Admissions Officers.

FERPA regulates all public and private agencies and institutions that receive federal educational funds, including grants, student financial aid, and contracts. The Act covers postsecondary, secondary and elementary education.

FERPA gives students who reach the age of 18 or who attend a postsecondary institution the right to inspect and review their own education records, and to protect their privacy by limiting access to the records by others. Institutions may not disclose information contained in education records without the student's written consent except under conditions specified in the Act.

It is important to note that institutions may grant a student more rights than those guaranteed in the Act.

FERPA SPECIFICS:

Except as provided for under circumstances set forth in the Act, a university may not disclose information contained in a student's education records to third parties without the student's prior written consent except to "university officials" who have a "legitimate educational interest"in the information.

Key Terms:

Students: Any individual for whom the institution maintains education records. The term does not include those who have not been "in attendance" at the institution.

Individual institutions should define when it considers a student "in attendance" and the Department of Education should defer to that decision as long as it has some reasonable basis in fact and is consistently applied. Possible benchmarks include: acceptance by the school of the student as a member of an incoming class; participation by the student in orientation; enrollment or registration, **but in no event can it be later than the start of classes**. How the institution defines who is a student will determine its obligations under public records laws.

> Applicants: FERPA does not apply to records of applicants for admission who are denied acceptance or, if accepted, do not attend an institution.
>
> Former students: Institutions are not required by FERPA to notify former students of their FERPA rights. Students who have ceased attendance or have graduated from an institution maintain the right to (a) inspect their education records; (b) have a hearing to amend an education record; and (c) have their education record treated as confidential by the institution.
>
> Former students do not have the right to request non-disclosure of their former institution unless they ask at their last opportunity as students, that no directory information be disclosed. If a student has requested non-disclosure of directory information in his/her last

semester of attendance, that request must be honored until that student requests its removal. A time limit can be placed on any requests for non-disclosure as long as a student is currently attending and the time limit occurs when the student is still enrolled.

Deceased students: FERPA no longer applies and the institution may exercise its own discretion in deciding whether and under what conditions information should be disclosed to survivors or third parties.

Attendance: Includes, but is not limited to, attendance in person or by correspondence study, and the period during which a person is working under a work-study (cooperative) program.

School/University Officials: University officials do not necessarily need to be employees of the university if they are acting in an official capacity on behalf of the university. If the institution utilizes the disclosure exception for "other school officials" it must include in its annual notice the specific criteria for determining who are "other school officials" as well as their legitimate interests. The FERPA final regulations published in the *Federal Register* on January 17, 1995, clarify that FERPA does not prevent the disclosure of information from student disciplinary records to the school's law enforcement unit so long as the officials of the law enforcement unit have been designated as "school officials" with legitimate educational interests under the school's own student records policy.

Directory Information: The DOE Family Compliance Office has agreed that directory information can include a student's e-mail address. Additionally, student photographs may be included in an institution's definition of "directory information". However, parents' addresses should not be included in the category of directory information as defined by the institution, even though in many instances a student's permanent address may be the same address as his/her parents. Current addresses of alumni are not "student records."

The FERPA Amendment Procedure

A student can request that education records which are inaccurate or misleading be amended. Under §99.20 of the FERPA regulations, an institution is required to consider a student's request for amendment, to inform the student of the decision, and if the request is denied, to advise the student of the right to a hearing on the matter. If, as a result of the hearing, the institution decides not to amend the record, then the student has a right to insert a statement in the record setting forth his or her views. The statement must remain with the record for as long as the record is maintained. The FERPA amendment procedure may not be used to challenge conclusions that have been made about a student's performance. Only inaccurately recorded facts may be challenged.

II. RECENT AMENDMENTS AND THE NEW FERPA REGULATIONS

FERPA was most recently amended effective December 26, 1996.

A. **Annual Notification of Rights - Section 99.7**: Educational agencies and institutions are no longer required to adopt a formal written student records policy. Instead, institutions are now *required to include additional information in the annual notification to students regarding* their rights under the Act. Institutions must annually notify students currently in attendance of their rights by any means that are reasonable, such as publication of a notice in the student handbook, catalog, or student newspaper.

The Secretary will allow institutions up to three (3) years to transfer from the old policy requirements and to implement the new requirements concerning the annual notification. Institutions are given the flexibility to determine how to effectively notify individuals with disabilities and those having a primary language other than English.

B. **Disclosure of Information Concerning Juvenile Justice System - Section 99.38**: FERPA now allows disclosure of information from education records, without prior consent, to certain state and local officials pursuant to a state law authorizing the disclosure in connection with a juvenile justice system. The disclosure of information must relate to the system's ability to effectively serve, prior to adjudication, the student whose records are being released and may not be redisclosed to any other party, except as provided under state law.

C. **Penalty For Third Party Violations - Sections 99.31, 99.33**: FERPA now provides that if a third party rediscloses personally identifiable student information in violation of FERPA, the educational institution which disclosed the information to the third party shall be prohibited from permitting access to education records to that third party for a period of not less than five (5) years.

☞ Practice Pointer From the AACRAO Guidelines[3]:

> Institutions are responsible for informing parties to whom personally identifiable information is released that recipients, as a general rule, are not permitted to disclose the information to others without the written consent of the student.
>
> Sample wording - "The attached information has been forwarded to you at the request of the student with the understanding that it will not be released to other parties. The Family Educational Rights and Privacy Act of 1974, as Amended, prohibits the release of this information without the student's prior written consent. Please return this material to the University if you are unable to comply with this condition of release."

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3. Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended, Revised 1995 Edition, American Association of College Registrars and Admissions Officers.

D. **Legal Actions - Section 99.31**: If the educational institution initiates legal action against a parent or student, it must make a reasonable effort to provide advance notification to the parent or student of its intent to disclose the information from the student's education records to a court of law. The Department has also clarified that FERPA allows an educational institution to infer the parent's or student's *implied waiver* of the right to consent to the disclosure of information from the student's education records if the parent or student has sued the institution. Discussion contained in the comments for the final regulations includes the following:

> "The Secretary believes this interpretation is sound because an educational institution must be able to defend itself if a parent or student has initiated the legal action against the institution."

Because this interpretation does not place a requirement on educational institutions, it is not included in the text of the final regulations.

E. **Federal Grand Jury and Other Subpoenas issued For a Law Enforcement Purpose - Section 99.31**: The requirement to make a reasonable effort to notify the student of an order or subpoena in advance of compliance so that the student may seek protective action does not apply to:

(1) A Federal Grand Jury subpoena for which the court has ordered that the existence or the contents of the subpoena or the information furnished in response thereto not be disclosed; and

(2) Any other subpoena issued for a law enforcement purpose for which the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response thereto not be disclosed.

F. **Disclosures of Certain Behavior - Section 99.36**: The amendments serve to clarify that nothing in FERPA prevents institutions from maintaining, and disclosing under certain circumstances, specific information regarding disciplinary action taken against students. Particularly, the institution may include information in a student's education records concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community.

Further, the institution may disclose, without prior consent, information contained in a student's education records concerning disciplinary action taken against the student (for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community) to school officials who have legitimate educational interests in the student's behavior. From the comments:

> "FERPA has always permitted . . . nonconsensual disclosure of this information (and other education records) in situations where students are seeking or intending to enroll in another educational agency or institution. If a student has been enrolled in the new institution for a period of time, the Secretary interprets Sec. 99.31(a)(2) to permit educational agencies or institutions to send corrected education records or additional education records, to the new institution (if it has already sent education records under this exception) as part of an original disclosure."

G. Finally, the Department has clarified that persons filing complaints with the Department of Education under FERPA must have legal standing, that is, the complainant must be a parent or eligible student affected by an alleged violation. But remember: there is ample case law holding that FERPA does not create a private right of action; instead, it provides expressly that the Secretary of Education is responsible for enforcing its provisions and protections[4].

H. Definitions Amended by the Recent Final Regulations:

Record - any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

Disclosure - to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

III. RELATIONSHIP OF FERPA TO OTHER FEDERAL LAWS

A. Student Right-To-Know and Campus Security Act:

Discipline - An institution does not violate FERPA if it discloses the results of a disciplinary proceeding against the alleged perpetrator to the alleged victim of a "crime of violence" as defined by 18 U.S.C. Sec. 16. Generally, for a crime of violence, disclosure to the victim is permissive but not mandatory. Under the Campus Sexual Assault Victim Bill of Rights Act (20 U.S.C. Sec. 1092(f)(7)), if the victim is alleging a sexual assault, the institution's policy must include a clear statement that "both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding". For these purposes, the outcome of a disciplinary proceeding means the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused.

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[4] *Norris by Norris v. Board of Education of Greenwood Community School Corp.*, S.D.Ind. 2992, 797 F.Supp. 1452; *Francois v. University of the District of Columbia*, D.D.C. 1992, 788 F.Supp. 31.

SRTK Reporting Requirements For Transfer-Out Students/IPEDS Graduation Survey

Under the provisions of the Student Right-to-Know and Campus Security Act, institutions participating in Title IV financial aid are required to publish the rate at which full-time, first-time, degree/certificate-seeking undergraduate students graduate, and a separate rate at which these students transfer to other institutions. New federal regulations require the publication and disclosure to prospective students of "success rates" (graduates and transfer-outs).

To comply with this requirement, third parties (such as the National Student Loan Clearinghouse TransferTrack Service) are offering to act as the agent for college and universities in collecting this data and fulfilling the reporting requirements.

Institutions should grant limited authority to the third party agent in the sharing of student enrollment data in order to protect the confidentiality and privacy rights of students. Authority should be limited to (a) disclosures to a student's financial aid provider, and (b) disclosure to a student's prior institution of enrollment, provided that the disclosure is to allow the prior institution to comply with the Student Right-To-Know Act and the IPEDS Graduation Rate Survey Requirements.

The Department of Education has outlined in an October 18, 1996 letter that disclosures to third party providers for these purposes without the prior consent of the students are not in violation of FERPA. However, disclosure beyond these purposes, such as for non-degree seeking students, part-time students and transfer-in students, could amount to a FERPA violation. The TransferTrack Service Agreement contains a warranty by the institution that it will only request subsequent enrollment information on former students whose transfer-out rates are required to be disclosed by the institution.

H.R. 715 - The Accuracy In Campus Crime Reporting Act: The Accuracy in Campus Crime Reporting Act includes a variety of proposed amendments to the Higher Education Act of 1965. Of specific relevance, Section 3. includes a provision which would exempt the following from FERPA's definition of educational records:

"records which are made and or maintained by any officer, office, department or individual employee of an educational agency or institution about -

> (I) individuals accused of committing and/or participating in any criminal activity as defined in Local, State or Federal law alleged to have occurred while the student was in attendance, including audit or non-credit, at an educational agency or institution whether or not those acts have actually resulted in criminal charges, prosecution, or conviction which are relative to said alleged misconduct;

(II) the accused in subsequent internal disciplinary proceedings of any kind resulting from an or related to said alleged activity regardless of the terminology or nature of the institutional infraction or policy violation alleged;

(III) the time, duration, attendance policy and location or locations of any such disciplinary proceedings;

(IV) the findings relative to the accused of any such disciplinary proceedings;

(V) the current disposition or status of the case; the sanctions incurred (if any) and any subsequent findings or amendments to such sanctions; and

(VI) accusations of criminal misconduct and related sanctions from any previously attended educational agencies or institutions where such records were created on or after September 1, 1998 and which are maintained by the institution currently and or most recently attended by the individual; and

(VII) any criminal acts required to be reported under paragraph (1)(F), (1)(H), or (4) of section 485(f) of the Higher Education Act of 1965 (20 U.S.C. 1092(f))."

The effective date for the amendment, if passed, would be September 1, 1998.

B. **Solomon Amendment**: Passed as part of the Omnibus Consolidated Appropriations Act of 1997, the Solomon Amendment prohibits a university or college, including community colleges, from receiving federal funds if the Secretary of Defense determines that the university or college has a policy or practice which prohibits or prevents ROTC units and/or military recruiters from recruiting on campus.

Coordination with FERPA - Directory Information Policies: Issues immediately arose for institutions which do not disclose directory information or for institutions with students who have requested non-disclosure of directory information. These issues are addressed in the Solomon Amendment as follows:

"The limitations established in paragraph (a) of this section, shall not apply to a covered school if the Secretary of Defense determines that the covered school:

(2) Has a long-standing policy of pacifism based on historical religious affiliation;

(3) Excludes all employers from recruiting on the premises of the covered school;

(4) When not providing any directory information on students, certifies that such information is not collected by the covered school;

(5) When not providing directory information for specific students, certifies that each student concerned has formally requested the covered school to withhold this information from third parties;

(6) Permits employers to recruit on the premises of the covered school only in response to an expression of student interest, and the covered school: (I) provides the Military Services with the same opportunities to inform the students of military recruiting activities as are available to other employers; or (ii) certifies that too few students have expressed an interest to warrant accommodating military recruiters, applying the same criteria that are applicable to other employers. [32 C.F.R. Sec. 216.4(c)(2)-(6)]

For institutions otherwise disclosing directory information, institutions may charge the military for directory information as long as it is reasonable and customary. Additionally, the information need not be provided in any special format requested by the military which would not be otherwise customary for the institution.

An institution that refuses to permit access to military recruiters will lose funds they receive not only from the Department of Defense, but also from the Departments of Education, Labor, Health and Human Services and other "related agencies". These funds include some financial aid for students. Directory information on students as defined by the Department of Defense interim rules published in the *Federal Register*, April 8, 1997 (Volume 62, Number 67) includes the student's name, address, telephone listing, date and place of birth, level of education, academic major, degrees received, and the educational institution in which the student most recently was enrolled.

Institutions do not have to provide information not included in the regulations. In fact, doing so could be in violation of FERPA. The effective date for the interim rule was March 29, 1997 and institutions should therefore presently be in compliance.

C. The Hope Scholarship and Lifetime Learning Credits:

Under the Taxpayer Relief Act of 1997 (Pub.L. No. 105-34,sec. 201(c),111 Stat. 804), certain taxpayers who pay qualified tuition and related expenses to an eligible educational institution may be allowed to claim a Hope Scholarship Credit or a Lifetime Learning Credit against their federal income tax liability.

The Hope Scholarship Credit is available for qualified tuition and related expenses paid after December 31, 1997, in taxable years ending after that date for education furnished in academic periods beginning after December 31, 1997.

The Lifetime Learning Credit is available for qualified tuition and related expenses paid after June 30, 1998, in taxable years ending after that date for education furnished in academic periods beginning after June 30, 1998.

The Treasury Department intends to issue regulations on the information reporting requirements of section 6050S. Pending issuance of the regulations, the IRS has published Notice 97-73 describing the nature of the information that will be required to be reported under section 6050S for 1998.

Institution Filing Requirements For 1998: an eligible educational institution that receives payments of qualified tuition and related expenses in 1998 must file an information return with the IRS with respect to each student on whose behalf payments were received. The information returns (Form 1098-T) must include:

(1) the name, address and TIN of the eligible educational institution,

(2) the name, address and TIN of the individual with respect to whom payments of qualified tuition and related expenses were received during 1998,

(3) an indication as to whether the individual named in the second item was enrolled for at least half the full-time academic workload during any academic period commencing in 1998, and

(4) an indication as to whether the individual named in the second item was enrolled exclusively in a program or programs leading to a graduate level degree, graduate level certificate, or other recognized graduate level educational credential.

By letter dated November 25, 1997, the Department of Education issued a letter regarding the relationship between FERPA and the Hope Scholarship Credit and Lifetime Learning Credit reporting requirements.

IV. CASE LAW RELATED TO FERPA and DISCIPLINARY RECORDS

Bauer v. Kincaid, 759 F. Supp. 75 (W.D.Mo. 1991) - SMSU student/editor-in-chief of the student newspaper sought to inspect and copy incident reports of the SMSU Safety and Security Department concerning crimes occurring on campus. In most of those reports, students are alleged victims or suspects. The reports include suspected or reported crimes, including sexual assault, robbery, criminal assault, burglary, stealing and other crimes allegedly committed by students and non-students on the SMSU campus. Although the SMSU Safety and Security Department was not a commissioned law enforcement agency, it operated as a de facto law enforcement agency and its records were treated accordingly under the Missouri Sunshine Law.

The Court concluded that the criminal investigation and incident reports were not exempt from disclosure or protected as educational records by FERPA.

Student Press Law Center v. Alexander, 778 F. Supp 1227 (D.D.C. 1991) - Student journalists and the Student Press Law Center brought a legal action challenging the Department of Education's authority to withdraw federal funding from universities which comply with FERPA's requirement of non-disclosure of personally identifiable information contained in arrest reports and incident reports of campus police. This challenge was based upon a claim that the foregoing requirement of FERPA violated that plaintiffs' First Amendment right to free speech and freedom of the press as well as Fifth Amendment right to equal protection.

The Court, persuaded by plaintiffs' First Amendment claim, granted plaintiffs' motion for preliminary injunction and enjoined DOE from preventing universities from releasing personally identifiable information regarding students contained in law enforcement records by threatening to withdraw or withdrawing funds.

John Doe v. The Red & Black Publishing Co., Inc. and the Board of Regents of the University System of Georgia, 262 Ga. 848, 427 S.E.2d 257 (1993) - John Doe filed a complaint asking that the Board of Regents be enjoined from turning over records of student judiciary proceedings involving him to a publishing company, and further that the publishing company be enjoined from publishing the records or his real name. Plaintiff argued that if his record and true name were published, his reputation would be harmed and he would be subjected to unnecessary scrutiny and his right to privacy would be violated. In addition, he claimed that the records were "education records" as defined by FERPA and therefore exempt from inspection.

The Court concluded:

(1) records of the main court of the student judiciary are "public records" under the Georgia Open Records Act.

(2) Even if FERPA were construed to prevent disclosure, records of the student judiciary's organization court were not "education records" as defined in the Act.

(3) Under an invasion of the right of privacy analysis, the records were a matter of legitimate public interest and inquiry. The court found nothing in the file which would constitute an invasion of the personal privacy of John Doe under Georgia law.

Florida State University v Hatton, 672 So. 2d 576 (1st D.C.A. 1996) - Florida State University sought review of a non-final administrative order requiring it to produce "formal orders applying to all Student Conduct Code cases brought against any FSU student over the most recent two years, with any and all information by which a student could be identified redacted from the orders." The Court found that the Hearing Officer abused his discretion in requiring the University to produce redacted, confidential student records. The Court concluded that the requested reports and records contained identifying information about victims, witnesses and accomplices. The Court concluded that the requested documents were records within the meaning of Florida Statute 228.093, which closely parallels the "Buckley Amendment". The administrative order was reversed and remanded with instructions that FSU be allowed to present statistical information in lieu of the requested documents.

The State ex rel. The Miami Student et al. v. Miami University et al., 79 Ohio St. 3d 168, 680 N.E.2d 956 (1997) - In 1995, the Miami University student newspaper requested a copy of University records related to student disciplinary proceedings. The newspaper indicated that the University did not need to include the name, social security number, student identification number, or other information that disclosed the identity of an accused or convicted party. The University complied, but in addition to deleting the above information, the University deleted the gender and age of the accused, as well as the time, date and location of the alleged incidents. The newspaper subsequently brought a mandamus action to compel the University to provide the requested records.

In a 5-2 decision, the Ohio Supreme Court held that University disciplinary records are not educational records and accordingly, granted the newspaper's request to compel compliance. In its decision, the Court held that University disciplinary proceedings are "non academic in nature", and, as such, were not subject to FERPA. The Court drew a distinction between records related to the student disciplinary process and records related to academic/scholastic performance and financial aid. Accordingly, the Court ruled in favor of the student press and ordered the University to comply with the newspaper's request. Specifically, the Court ordered the University to provide the following additional information: age and gender of the student, the general location of the incident, the nature of the offense and type of disciplinary penalty imposed.

Following the Court decision, the Department of Education issued a letter to the President of Miami University dated August 7, 1997 which addresses the Court decision. In this letter, the Department of Education concludes: "Although the Supreme Court of Ohio stated that student disciplinary records are not "education records" protected by FERPA, the Department believes that this ruling is wrong as a matter of law. However, the court did not order the University to disclose information from disciplinary records in personally identifiable form...Thus, you may comply with [the] court's ruling without violating FERPA as long as personally identifiable information... is not disclosed from education records."

On December 8, 1997, Miami University's Petition for writ of certiorari to the United States Supreme Court was denied.

CURRENT ISSUES UNDER FERPA

1997 NACUA Annual Conference
June 18-21, 1997
Cary M. Jensen
University of Rochester
Rochester, New York

The purpose of this outline is to highlight recent regulatory changes and current issues involving access to student records such as campus discipline and law enforcement records, access to directory and other information by third parties and access by parents or other family members of a dependent or deceased student.

Throughout this outline parenthetical references which appear as follows: "(Jensen 6/18/97)" refer to the author and date of a relevant NACUANET posting.

I. RECENT REGULATORY CHANGES

In the *Federal Register* of November 21, 1996 the Secretary of Education announced amendments and clarifications to the FERPA regulations (34 CFR part 99) which had been made in order to implement changes made to the FERPA statute (20 U.S.C. § 1232g) by section 249 of the Improving America's Schools Act of 1994 (IASA). The new regulations took effect December 23, 1996. According to a summary provided by the Family Policy Compliance Office, the new FERPA regulations:

a) Give educational agencies and institutions greater flexibility by removing a previous regulatory provision requiring schools to adopt a formal written student records policy and, instead, requiring schools to include additional information in the annual notification of rights. A model notification is included in the appendix of the regulations or may be obtained from the Department's Family Policy Compliance Office.

b) Require State educational agencies (SEAs) to afford parents and eligible students access to education records maintained by the SEA. This right of access is the only right parents and eligible students can afforded at the SEA level.

c) Clarify that, if an educational agency or institution initiates legal action against a parent or eligible student, it must make a reasonable effort to notify in advance the parent or student of its intent to disclose the information from education records to a court of law.

d) Amend FERPA so that a school is not required to notify a parent or eligible student, before complying with certain subpoenas. A school does not have to notify the parent or student of the existence of a subpoena if it receives a Federal grand jury subpoena and the court has ordered that the school not disclose to any person the existence or contents of the subpoena. Additionally, if courts or other issuing agency issues a subpoena for a law enforcement purpose and orders the school not to disclose the existence or contents of the subpoena to the parent or student, FERPA does not require notification before compliance with the subpoena.

e) Amend FERPA to allow disclosures of education records, without prior consent, to certain State and local officials, pursuant to a State statute that allows the disclosure in connection with a juvenile justice system. The disclosure of information must relate to the system's ability to effectively serve, prior to adjudication, the student whose records are being released and may not be redisclosed to any other party, except as provided under the State law.

f) Clarify that an educational agency or institution may include information in a student's education records concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, other members of the school community.

g) Clarify that an educational agency or institution may disclose, without prior consent. information contained in a student's education records concerning disciplinary action taken against the student, described above, to teachers and school officials who have legitimate educational interests in the behavior of the student. FERPA was amended to allow this type disclosure to teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

h) Add a provision that, if a third party rediscloses personally identifiable student information in violation of FERPA, the educational agency or institution which disclosed the information to the third party shall be prohibited from permitting access to education records to that third party for a period of not less than five years.

i) Clarify that persons filing complaints: with the Department under FERPA must have legal standing. That is, a complainant must be a parent of eligible student affected by an alleged violation. This is consistent with other laws affording specific rights to persons.

In addition, in January 1995 there were significant regulatory changes and clarifications relating to law enforcement unit records and campus discipline records (*Federal Register* Vol. 60, No. 10, Tuesday January 17, 1995, 3464-3469) which are discussed at III and IV below.

II. ANNUAL NOTIFICATION

According to the new regulations, institutions are no longer required to have a FERPA policy (with all the elements outlined in 34 CFR 99.6); instead, they must annually notify students currently in attendance of their FERPA rights.

Note: The Department does not require schools to individually *notify* eligible students of their rights, but only that they *give notice* that is *reasonably likely to inform* the students of their rights which includes effective notification of students who are disabled.

1. The annual notice must inform students that they have the right to:

    a) Inspect and review the student's education records;

    b) Seek amendment of the student's education records that the student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

    c) Consent to disclosures of personally identifiable information contained in the student's educational records, except to the extent that FERPA and § 99.31 authorize disclosure without consent; and

    d) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the institution to comply with the requirements of FERPA and its regulations.

2. The annual notice must also include all of the following:

    a) The procedure for exercising the right to inspect and review education records;

    b) The procedure for requesting amendment of records under § 99.20 (including the actual procedures may be optional if the institution provides this information to students seeking to amend education records--see comments to § 99.7, *Federal Register*, November 21, 1996 at 59293); and

    c) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

3. FERPA Hearings/Requests to Amend Records

One likely "side effect" of the new regulations' annual notification requirement (which highlights amendment procedures) will be an increase in the number of requests to review and/or amend education records. As institutions review and revise amendment and hearing procedures, they should remember that the FERPA hearing is not a forum to re-decide substantive decisions, but is merely an opportunity to question the accuracy of the record to insure that the record in question accurately states the underlying decision, not whether the underlying decision was wrongly decided). See Lewin v. Medical College of Hampton Roads 931 F. Supp. 443 (E.D. Va. 1996). (McDonald 3/5/96).

FERPA's rights of access to records for review and revision not only apply to current students but to former students and applicants as well (at least those applicants who eventually attend the institution). In a highly publicized ruling several years ago, the Family Compliance Office determined that a student had access to his admission file, including sheets which summarized confidential recommendations to which the student had waived access. (August 22, 1991 letter from LeRoy Rooker).

Alumni and other former students also have rights to access their education records and/or request an amendment for inaccurate or misleading information within their files. The Family Compliance Office has opined that the right to access and question records may be made anytime, even long after graduation. A recent NACUANET discussion produced a split of opinion as to whether FERPA rights would extend to students who graduated before 1974 (when FERPA was passed) (Lynch, Cole, Drew & Bienstock 4/26/95 - 4/28/95). Institutions should consider adopting a records retention policy which specifies how long certain types of records will be kept and when they will be destroyed.

Recent NACUANET postings have discussed records retention policies for disciplinary records, with retention periods ranging from 1-6 years with the most frequent retention period being 5 years (Gordon, M. Smith, A. Smith, Lyncyh, Crittenden 1/14/97) (Cardinalli 5/14/97). Recommended sources for records retention issues include a new manual, "Record Retention for Public Colleges and Universities in Ohio" (available for $25 from the Inter-University Council at (614) 464-1266) and the Association of Records Managers and Administrators (ARMA). (ARMA regional chapter's web page at http://www.flash.net/~survivor). (Erjavec 1/30/97).

III. DISCIPLINE RECORDS

Recent newspaper articles such as "Seeking Full Disclosure" and "Crime on Campus: How Safe Are Students?" (Washington Post 4/6/97), "College Campuses Hold Court In Shadows of Mixed Loyalties" (New York Times 5/5/96) "Misguided Campaign for the Release of Students' Disciplinary Records" (Chronicle of Higher Education 4/27/94) and "The Campus Crime Wave" (York Times Magazine 3/7/93) are illustrative of the current concerns over campus crime and access to campus discipline records. Demands for access to such information are not likely to decrease any time soon; therefore institutions must be prepared to respond to the legal, ethical and public policy issues involved. Central to this debate is whether records of internal campus disciplinary proceedings are "education records" under FERPA. At present, the answer to that question is "yes" (particularly in light of recent clarifications from the Department of Education).

However, pending legislation and court decisions may change that. Following are summaries of relevant legislative actions, regulatory changes, cases and policy considerations pertaining to student disciplinary records.

A. Legislative actions

1. The Student Right to Know and Campus Security Act (20 U.S.C. § 1092)

Enacted in 1990, the Student Right to Know and Campus Security Act (P.L. 101-542) amended FERPA by adding the following subsection:

> (6) Nothing in this section shall be construed to prohibit an institution of post-secondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in § 16 of Title 18), the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime.

18 U.S.C. § 16 defines a crime of violence as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against that person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

By creating this specific statutory exception, Congress demonstrated its intent to generally include records of campus disciplinary procedures within the protections of FERPA. (If not, the amendment would be superfluous) This narrowly construed exception only contemplates the disclosure of the *results* of the disciplinary proceeding. It is also important to note that under this exception disclosure is *permitted*, not necessarily required.

2. The Campus Sexual Assault Victims Bill of Rights Act.

Part of the Higher Education Amendments of 1992, this act (which has been codified at 20 U.S.C. § 1092 (f)(7)--also see 30 CFR § 668.47(a)(12)(vi)) provides that an institution's statement of policy concerning its sexual assault programs to prevent sex offenses must include a clear statement that [illegible]

> (a) The accuser and the accused are entitled to the same opportunities to have others present during a disciplinary proceeding; and

(b) Both the accuser and the accused shall be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense.

This act further clarifies that "Compliance with this subsection does not constitute a violation of FERPA. For the purpose of this paragraph, the outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused."

This provision arguably amends FERPA *sub silentio* at least for situations of campus disciplinary proceedings based on sex offenses. Unlike the 1990 amendment, the accused is also entitled to know the outcome. More significantly, the disclosure of the outcome to the victim and accused is mandatory, not just permitted.

3. Improving America's School Act of 1994 (P.L. 103-382)

FERPA amendments are included at 108 Stat. 3924 of this Act. While not directly relevant to student discipline, these amendments provide that subpoenas for student records for purposes of law enforcement may now provide that the school shall not notify the student. The amendments also provide when student record information is released to a third party under a FERPA exception and the third party is directed not to disclose it, that a violation of this confidentiality by the third party must result in the institution prohibiting that party from receiving student record information for at lease five years. The amendments also provide that notification to students of FERPA rights must be effective and that students can challenge their student records only on the grounds that they are inaccurate, misleading, or a violation of privacy rights and not on the grounds that they violate "other rights".

4. HR Resolution 470

Last September the House of Representatives unanimously passed a resolution which calls upon the Department of Education to make their job of monitoring compliance and enforcement of the Campus Security Act a priority.

(Pending Legislation)

5. Open Campus Police Logs Act of 1995 (HR 2416)

Proposed amendment to the Higher Education Act of 1965 to require each institution which maintains either a police or security department of any kind to make, keep and maintain a daily log of all reported crimes, the date, time and location of such crimes, and, if an arrest has been made, the names and addresses of all persons arrested and charges against such persons arrested. The act further specifies that all entries in the daily logs shall be open to public inspection.

Several states, including California, Massachusetts, Minnesota, Pennsylvania, Tennessee and Virginia have recently adopted some form of "Open Campus Police Logs" law.

6. Accuracy in Crime Reporting Act of 1997 (HR 715)

Introduced by Rep. Duncan (R-TN) and Schumer (D-NY). Among its various provisions it would: (1) require that every institution maintain and provide public access to a crime log detailing the "nature, date, time and general location" of each incident reported to the institution's security department; (2) require that campus disciplinary proceedings and records that involve criminal allegations be open to the public (except for previously created education records not related to the criminal allegations which were used during the course of the disciplinary proceeding); (3) expand the types of crimes that must be reported under the existing Campus Security Act; (4) clarify that almost all school officials and employees -- not just campus security personnel -- must report statistical information about campus crime reported to them; and (5) impose monetary penalties on institutions that violate the new reporting requirement.

The Accuracy in Crime Reporting Act has generated widespread bi-partisan support. It currently has 37 cosponsors and has been referred to the House Committee on Education and Workforce.

7. HR 503

Introduced by Rep. Andrews (D-NJ) on February 4, 1997, HR 503 proposes adding a new subparagraph (7) to FERPA which states, "Nothing in this section shall be construed to require a State or county prosecutor to obtain a court order to receive student information before or after adjudication, if the information sought pertains to a criminal investigation or prosecution of such student." (Geller 6/6/97).

B. Regulatory Changes

In response to the changes to FERPA in the Higher Education Amendments of 1992 (P.L. 102-325), the Department of Education issued a final rule on January 17, 1995, in which they officially "ended" the debate over whether student discipline records are education records under FERPA, or at least shifted it back to Congress. The final rule, which is somewhat short on actual amendments and long on explanatory discussion, unequivocally states, "Based on the broad definition of 'education records' which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, *all disciplinary records, including those related to non-academic or criminal misconduct by students, are 'education records' subject to FERPA*."

While this final rule was a set-back to student press groups and others pressing for more access, it includes the statement that FERPA does not prevent an institution from opening disciplinary proceedings to the public. Hailed as the "shot heard round the student press world," those seeking access to campus crime information now point to this as an official endorsement from DOE that if records can not be made available, they should at least be allowed access to the hearing itself.

The final rule also distinguished the highly publicized Red & Black Publishing case (which held that disciplinary records were not "education records") on the grounds that the disciplinary hearing and records at issue involved action against a student organization (fraternity) as opposed to an individual student and cited with approval the more recent Shreveport case which held just the opposite. Notwithstanding, DOE's opinion that "only Congress has the authority to change the statutory provisions of FERPA to permit disclosure of disciplinary records without prior consent," student press groups and other access advocates have continued to press the issue in court.

C. Cases

1.) Cases which consider student disciplinary records outside FERPA's restrictions on the release of "education records." All pre-date the 1/17/95 final rule):

a. Bauer v. Kincaid 759 F. Supp. 575 (W.D. Mo. 1991)
b. Red & Black Publishing Co., Inc., v. Board of Regents 427 S.E. 2d 257 (Ga. 1993)
c. SPLC v. Alexander 778 F.Supp 1227 (D.D.C. 1991)
d. Oaster v. University of Missouri (No. 93-1107-CV-W-3, W.D.MO. (July 6, 1994)

2.) Cases which consider disciplinary records "education records" under FERPA:
a. Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport, Case No. 393, 332, First Judicial District Court, Caddo Parish, LA (March 4, 1994)
b. Norwood v. Slammons, 788 F-Supp. 1020 (W.D. Ark. 1991)
c. DTH Publishing Corp. (Daily Tar Heel) v. UNC Chapel Hill (File No. 96 cvs 563, Superior Court, Orange County, NC, December 12, 1996) (currently on appeal)

3.) Decision Pending
State of Ohio, ex. rel. The Miami Student v. Miami University of Ohio, Case No. 96-1596 (Pending review by Ohio Supreme Court) Briefs available on line at the Security on Campus, Inc. web page at http://www.soconline.org.

D. Policy Considerations (courtesy of Barbara Bennett's outline from the 1995 Stetson Law and Higher Education Conference)

1.) Arguments presented against public access or disclosure:

(a) Policies regarding student conduct enforced through disciplinary proceedings are not an extension of the university's law enforcement activities. Many of these policies are developed not to protect potential victims but rather to inculcate a sense of responsibility and respect for others.

(b) Release of records of disciplinary proceedings could destroy the effectiveness of these policies and make students reluctant to speak forthrightly, accept responsibility, or agree to seek help for personal problems.

(c) The potential of disclosure can change a decision-making process by altering when decisions are made, who makes the decision, what decisions are made, and why they are made.

(e) The application of open meetings and open records laws have additional administrative costs and burdens because of notice requirements, transcription requirements, etc.

(f) Application of open records laws can encourage mediocrity because conservative and safe solutions are favored over new and creative ones.

(g) Disclosure can open a university up to other potential liabilities such as liability for invasion of personal privacy, defamation, infliction of emotional distress, breach of contract, and fraudulent misrepresentation.

(h) Proceedings generally use a much lower standard of proof for higher standards of behavior because they are not criminal in nature. Opening these records to public scrutiny could result in equating these proceedings to a criminal proceeding, thus requiring a higher standard of proof, lower standards of behavior, and the transformation of the hearings to mini-trials subject to rules and procedures defined by a state criminal system.

(i) Students do not have a right to counsel in most disciplinary proceedings and opening the records to the public may not be fair to an underrepresented student.

(j) The disciplinary panel usually does not have the right to subpoena witnesses or compel testimony and must rely on the integrity of student witnesses, Opening these proceedings to the public could undermine the effectiveness and educational value of the proceeding.

(k) Regardless whether disciplinary records are open, most institutions publish the conduct and results of the proceedings in summary form to alert people to campus problems.

(l) If disciplinary hearings are open to the public, many students who now come forward would refuse to participate, which could prevent many instances such as date rape and sexual assault from ever being reported.

2.) Arguments presented in favor of disclosure and openness of student disciplinary records:

(a) Public access to these hearings allows the public to evaluate the expenditure of public funds in the efficient and proper functioning of the institution.

(b) Disclosure would protect against corruption of the disciplinary process and increase public confidence in that process.

(c) Opening disciplinary records would undermine unsubstantiated rumors and allow the most accurate version of an incident to be made readily available. Such disclosure would deter victim and offender from disclosing biased or personal versions of an incident and promote only the disclosure of accurate charges.

(d) Open disclosure would serve as a deterrent because potential offenders would know prior to an offense that their identities could be publicly disclosed.

(e) Non-disclosure of disciplinary records is inconsistent with our educational goal of treating students as adults and holding them fully responsible for the consequences of their behavior.

(f) If disciplinary records are not disclosed, persons who commit crimes on campus may be treated differently from someone who commits the crime in the general public.

IV. LAW ENFORCEMENT RECORDS

With the active debate over campus crime records and student disciplinary records, one would expect more discussion about FERPA's exclusion for campus "law enforcement unit" records from the definition of "education records." Part of the reason this exclusion has received so little attention is that the previous definition of law enforcement unit records was completely unworkable. (Required that personnel of the law enforcement unit not have access to other educational records and that the records of the law enforcement unit be kept apart from other education records, be maintained solely for law enforcement purposes and not be made available to persons other than law enforcement officials in the same jurisdiction). LeRoy Rooker, Director, Family Policy Compliance Office, has indicated that the Department requested this FERPA amendment because the previous provision concerning law enforcement records was impractical, because of the increasing public concern about crime on campus, and because of the potential conflicts between FERPA and state open records laws that put institutions in untenable positions.

In the final rule issued January 17 1995, DOE relaxed the definition of law enforcement unit records to "those records, files, documents, and other materials that are: (i) created by a law enforcement unit; (ii) created for a law enforcement purpose; and (iii) maintained by the law enforcement unit." The new definition also clarifies that records of a law enforcement unit are not, "(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the institution other than the law enforcement unit; or (ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution." In other words, a campus security report or other law enforcement unit record that may also be used in a disciplinary proceeding would not lose it's FERPA exception unless it had been created exclusively for internal disciplinary action and not for any law enforcement purpose (which DOE expects to be "very rare, especially with incidents involving criminal conduct by students at postsecondary institutions"). However, in certain circumstances even one-time public records may become "education records" depending on why and where they are "maintained." (Yuan, Silzer 8/31/95) (Bienstock 9/1/95).

The recent amendments also added the term "individual" to the definition of law enforcement unit, to allow small institutions to designate a single individual responsible for law enforcement. This also allows persons who have additional responsibilities for internal discipline to be designated as the law enforcement unit and thus avail themselves of the FERPA exception, if the institution so desires. The recent amendments also clarify that FERPA neither requires nor prohibits the disclosure of law enforcement unit records.

V. DIRECTORY INFORMATION

1. Introduction

FERPA defines "Directory information relating to a student" as including the following: " the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received , and the most recent previous educational institution attended by the student." "Directory information" is technically within the definition of "education record," but is exempted from the consent rules, provided that the institution has made public notice of its intent to share directory information and has provided students with a reasonable opportunity to "opt out" if they choose.

While applicable state open records laws may do so, FERPA does not require the disclosure of even directory information; it only makes it permissible to release it without prior student consent (assuming student has had a chance to opt out). Some schools have elected not to have any directory information whatsoever. (Lynch 5/11/95).

2. Student photographs

Photographs and other "personally identifiable information" within a student record (not just the record itself) should be considered education records, according to FERPA's broad definition. This includes prints, tapes, film, microfilm and pictures. (Wilson 4/15/96) However, unless these are included in the institution's definition of directory information, the exception may not be available. (Shur 4/17/96--recommending inclusion of "photographic, video or electronic images of students" within the definition of directory information.)

3. E-mail addresses

Some would argue that an E-mail address is implied within the existing definition of "address" but there has been some debate on that point (Swan, L. Smith, Schmidt 2/3/95 - 2/8/95), (Geffen, Pelzer and M. Smith 1/29/97). Apparently the Family Compliance Office has opined that E-mail addresses are directory information so long as that's specified in the institution's definition (Savage 2/26/97).

4. Group Listings

Institutions are routinely asked for lists of students by characteristic groupings such as class, major, scholarships, honors, socio-economic background, ethnicity, national origin, etc. An informal opinion from one "federal official" suggested that such a list might violate FERPA (Silzer 5/11/95). Even though it's just a list of "names" the grouping and personal identifier which links the group may convert the directory information to an education record which requires consent before release. This very issue has arisen with the Solomon Amendment which the Department of Defense is using to enhance its recruiting efforts on campuses and going beyond FERPA and the bounds of directory information to do so.

5. Solomon Amendment

The new "interim rule" announced in the *Federal Register* April 8, 1997, but retroactively effective March 29, 1997, while the comment period is open (through July 7, 1997). Its purpose, as summarized in the *Federal Register* is as follows:

> The Department of Defense adopts this interim rule to implement the National Defense Authorization Act of 1995, National Defense Authorization Act for 1996, and the Omnibus Consolidated Appropriations Act, 1997 which state that no funds available under appropriations acts for any fiscal year for the Department of Defense, Transportation (with respect to recruiting), Labor, Health and Human Services, Education, and Related Agencies may be provided by contract or grant (including a grant of funds to be available for student aid) to a covered school that has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents, the Secretary of Defense from obtaining, for military recruiting purposes, entry to campuses, access to students on campuses, access to directory information on students or that has an anti-ROTC policy.

Recent NACUANET postings (S. Smith 4/10 and 4/15/97) (Grigg 4/7/97) and (Owen, Drew and White 4/9/97) haved raised issues such as how to treat "opt out" students when the Solomon Amendment's definition of directory information goes further than FERPA's definition. In other words, do students need another "opt out" or can we assume their consent without a fully informed disclosure? When confronted with this issue, the Department of Defense was "nonplused" by this argument. (S. Smith 4/15/97). Verbal opinions from both the Department of Education and Defense suggest that the Solomon Amendment supersedes FERPA to the extent the two conflict and that institutions should comply with Solomon even if it may result in a technical FERPA violation. But, as was pointed out in a recent IRS summons discussion (Lacy 4/25/97), neither agency is coming forward with indemnification, immunity or even a written opinion assuring non-enforcement.

The American Association of Collegiate Registrar and Admissions Officers (AACRAO) has prepared a useful "analysis" of the Solomon Amendment and it's impact on and interrelationship with FERPA (which AACRAO is careful to point out should not be relied on as legal advice.) The full text of the analysis can be found at:
http://www.aacrao.com/policy/govrel/solomon/analysis.html

A sampling of AACRAO's analysis (Q&A) follows:

> *Will I be in violation of FERPA if I comply with the Solomon Amendment?*
>
>> No. Schools need to consider FERPA as separate from the Solomon Amendment. Schools should continue following FERPA as usual and if you provide information to the military as required or permitted under the Solomon Amendment, you will not be in violation of FERPA.
>
> *What if our school has not designated the information requested by the military as "directory information" under FERPA, will we be in violation of FERPA if we release the information?*
>
>> No. FERPA should be kept separate from the Solomon Amendment. "Directory information" under the Solomon Amendment is unrelated to "directory information" under FERPA.
>
> *What if the military asks for information not included in the regulations, do we have to provide them this information as well?*
>
>> No. In fact you could be in violation of FERPA (unless a student has specifically authorized the release of the information) in certain circumstances such as:
>>
>>> If the military asks for information not required or permitted by the Solomon Amendment and not considered directory information under FERPA.

Example: The military asks for information on the race of students. The Solomon Amendment does not require or permit this and FERPA does not deem race as directory information.

If the military asks for information not required or permitted by the Solomon Amendment but considered directory information under FERPA, but your school has not designated it directory information.
Example: The military asks for information on the entire student body. The school has not designated date and place of birth as "FERPA directory information." The school provides date and place of birth on students who are 16 years old. (The Solomon Amendment only requires or permits the release of information on students who are 17 years of age or older).

You should only provide the military with information that is required or permitted under the Solomon Amendment interim rule, unless you would like to give the military additional information and it is permissible under FERPA. If you provide information that is not required or permitted under the Solomon Amendment and you are not allowed to release the information under FERPA, you will be in violation of FERPA.

VI. ACCESS BY PARENTS

1. Dependent student

Included in FERPA's list of persons to whom education records may be released without the consent of a qualified student are "parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986," which essentially means a member of the taxpayer's family or household who received more than half of their support in a given tax year from the taxpayer. The tax code also specifies that amounts received as scholarships for study at a qualifying institution (as defined in § 170(b)(1)(A)(ii)) by a taxpayer's children or stepchildren who are full time students for at least 5 months of the tax year need not be included in determining whether an individual has received more than half of his or her support from the taxpayer.

Rather than slogging through the IRS support rules each time the issue comes up, most institutions simply rely on a copy of the annual tax return to determine dependency, (which the

Family Compliance Office considers sufficient). Some institutes don't even try to take advantage of this exception given the administrative and documentation "nightmare" (Bienstock 3/16/95).

In a recent NACUANET discussion regarding "proving" dependency, it was generally held that relying on a photocopy of the front page or signature page of last year's return was sufficient and that requiring independent verification or an affidavit is probably overkill. One reason offered for only requesting the front page of the return is to avoid triggering financial aid verification requirements (Clark 4/12/96).

FERPA defines parent as including "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian." 34 CFR §99.4 also requires that institutions give "full rights under the Act to either parent, unless the agency or institution has bee provided with evidence that there is a court order, state statute or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes their rights."

2. Deceased Students

While the suggestion of FERPA issues involving deceased students may seem inconsequential or even trivial, it's a topic that simply refuses to die. (Garcia, Geffen, Weitzner, Anderson, Cordova, Lynch, Flygare 6/6/97), (Solomon 8/2/96), (Dutcher, Geffen 7/24/96). With the renewed national interest in genealogy and family history, institutions may see an increasing number of requests from heirs, relatives or other researchers seeking information on deceased students.

The Family Compliance Office has taken the position that FERPA rights die with the student-- See November 20, 1991 letter from Susan Winchell (Ulrich 7/24/96) and July 11, 1990 letter from LeRoy Rooker (Ward 4/17/95 and 7/24/96), both of which are available in NACUA's Legal Reference Service.

Some institutions allow disclosure to heirs but only if they are legitimate. Proper verification of death may be an issue in some cases with the appropriate documentation depending on the circumstances. For "ancient" records there is normally less concern, unless if there is something truly unflattering or scandalous in the record. For recently deceased student, some have advised that records should be released only to immediate family members, preferably those holding letters of administration.

Under state privacy statute, certain rights may pass to the personal representative of the deceased. For example, in California, privacy rights over medical and psychiatric records pass to the personal representative, regardless of FERPA (Lynch 6/6/97).

As with many other FERPA issues, this is an area where common sense, as much as legal arumin, should prevail.

VIII. FERPA RESOURCES

Questions on FERPA in general, or the new regulations in particular, may be directed to:

The Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 202024605

The American Association of Collegiate Registrars and Admissions Officers (AACRAO) publishes "Guidelines for Postsecondary Institutions for Implementation of the Family Education Rights and Privacy Act of 1974 as Amended" (Revised Edition, 1995). This is an invaluable resource for anyone handling day-to-day FERPA issues.

Contacting AACRAO:

One Dupont Circle, Suite 330
Washington, DC 20036-1171
Phone: (202) 293-9161
Fax: (202) 872-8857
E-mail: info@aacrao.com
Web page: http://www.acrao.com

"Open Records Laws and Student Disciplinary Records: Expanded Media Access to Student Records" Stetson Higher Education Law Conference, February 1995--Outlines and presentations by Barbara Bennett, Mark Goodman, Dennis Gregory and John Lowery.

"FERPA, HEAA and Balancing the Needs of Victims and Perpetrators: A Legal Quagmire?" NACUA Annual Meeting, 1993--Outlines and presentations by Carol Niccolls and David R. Scott.

"Covering Campus Crime: A Handbook for Journalists" published by the Student Press Law Center, 1101 Wilson Boulevard, Suite 1910, Arlington VA 22209 or electronically at splc@splc.org.

CURRENT ISSUES UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT ("FERPA")

June 18-21, 1997

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Minneapolis, Minnesota

I. Relationship between FERPA and Public Records Laws

A. Varying Approaches in State Records Laws

1. Statutes that explicitly adopt FERPA. *See, e.g.:*

    a. Michigan's Freedom of Information Statute which exempts from disclosure:

    > "Information the release of which would prevent the public body from complying with section 444 of subpart 4 of part C of the General Education Provisions Act, Title IV of Public Law 90–247, 20 U.S.C. § 1232g, commonly referred to as the family educational rights and privacy act of 1974." Michigan § 15.243, Sec. 13(1)(e).

    b. Arizona's statute on educational records, which provides:

    > "The right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in the family educational rights and privacy act of 1974, as amended (20 United States Code sections 1232g, 1232h and 1232i), and federal regulations issued pursuant to such act." Arizona § 15.141.A.

2. Statutes that adopt FERPA partially with some changes. *See, e.g.:*

    a. Minnesota Government Data Practices Act, which largely incorporates FERPA, but expands definition of student to include applicants who have not attended institution. Minn. Stat. § 13.32.

3. Statutes that have no reference to FERPA, but include a general provision exempting from disclosure records which are protected from disclosure by law. *See, e.g.:*

    a. Missouri Sunshine Law which authorizes closure for "records which are protected from disclosure by law. . . ." Missouri § 610.021 (14).

b. Oregon's student records law exempts from disclosure: "Student records required by state or federal law to be exempt from disclosure." O.R.S. § 192.496(4).

4. Statutes that have no reference to FERPA and define student records more narrowly than FERPA. *See, e.g.:*

a. Kentucky's statute on state universities and colleges which classifies student academic records as confidential, but states: "This confidentiality shall apply only to student academic records, including, but not limited to official transcript of grades." Ky. Laws § 164.283.

B. Conflicts Between State Laws and FERPA

1. FERPA is viewed by some courts as funding statute that does not prohibit release of student records under state records laws. *See:*

a. Red and Black Publishing Co., Inc., et al. v. Board of Regents et al., 427 S.E.2d 257 (Ga. 1993) – FERPA does not prohibit release of student organization disciplinary records under Georgia's open records act because:

(1) FERPA does not prohibit disclosure of records, but rather provides for withholding of federal funds for institutions with a policy or practice of releasing educational records; (2) disciplinary records are not educational records under FERPA, because they do not relate to individual student academic performance, financial aid or scholastic probation; and (3) FERPA allows release of educational records pursuant to a court order.

b. Bauer v. Kincaid, 759 F. Supp. 575(W.D. Mo. 1991) – FERPA does not prohibit release of campus law enforcement records under the Missouri Sunshine Law because:

(1) FERPA does not prohibit disclosure of records, but rather imposes a funding penalty for the disclosure of educational records; (2) law enforcement records are exempted under FERPA; and (3) FERPA violates equal protection clause and First Amendment rights of public to the extent it prohibits release of law enforcement records.

2. Other courts view loss of federal funding as equivalent of ban on release of student records. *See:*

   a. Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University, Case No. 393, 332 (First Judicial Dist., Caddo Parrish, La., Mar. 4, 1994) – Student disciplinary records may not be released under Louisiana Public Records Law because: (1) disciplinary records about students are maintained as part of single student records file; (2) intent of Congress to withhold federal funding from universities which violate FERPA is ample prohibition against release of student records; and (3) although court has power to release educational records under FERPA, court order will not be haphazardly administered without a compelling reason.

   b. Student Press Law Center v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991) – Court granted preliminary injunction to plaintiffs enjoining DOE from enforcing FERPA to withdraw federal funding from schools that had policy or practice of disclosing campus law enforcement records; in a footnote, the court rejected DOE's argument that FERPA was a funding statute that did not operate as a bar to release of the records. The Court stated:

   > Defendants thus ignore the obvious fact that FERPA is the universities primary reason for violating the state sunshine laws. Defendants' suggestion that the universities may choose to comply with state law and forego federal funding is unrealistic and disingenuous. 778 F. Supp. at 1232, fn.13.

3. Balancing test is employed by some courts when records sought are covered by FERPA. *See:*

   a. Zaal v. State, 602 A.2d 1247 (Md. 1992) – Criminal defendant seeking access to educational records of alleged victim of child abuse must demonstrate a genuine need for information that outweighs privacy interests of student; trial judge must conduct a balancing test weighing privacy rights of student against genuine need of party requesting information.

   b. Rios v. Read, 73 F.R.D. 589 (1977) – Privacy violations are no less objectionable when student records are obtained under court order, unless court conducts balancing test to determine that need for information outweighs privacy interests of students. *See also* Krauss v. Nassau Community College, 469 N.Y.S.2d 553 (Sup. Ct. 1983).

II. Student Records and Athletic Investigations

A. Status of Student Athletic Records Released to NCAA

1. Student athletes sign Buckley Amendment Consent form authorizing release of student data to NCAA. *See form attached as Appendix 1.*

2. DOE has taken the position in advisory letters that FERPA covers inquiry/investigation data released to NCAA regarding the student athlete.

   a. Attached as Appendix 2 is a letter of August 19, 1996 to University of Maryland stating that "A letter of inquiry or a report regarding a student athlete in attendance at a university is an education record under FERPA, because the letter is directly related to a student (mentions the student athlete's name) and is maintained by the school." Letter at p. 2.

   b. Attached as Appendix 3 is a letter of August 21, 1995 to Mississippi State University which states that "An investigative report, letter of inquiry, or other information which is directly related to a student and maintained by an educational agency or institution is an 'education record' under FERPA." Letter at p 1.

B. Obligations of NCAA With Respect to Data

1. FERPA prohibits redisclosure of student record by a third-party without student's consent. It states:

   > *[P]ersonal information shall only be transferred to a third-party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third-party outside the educational agency or institution permits access to information in violation of paragraph (2(A)), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access from education records to that third-party for a period of not less than five years. § 1232g (b)(4)B*

2. Statutory provision above is reflected in § 99.33 of the regulations and also in attached letter of August 16, 1996 from DOE stating that "information

from an education record that the NCAA receives from an institution cannot be redisclosed without the student's prior written consent." Letter at p. 3.

3. Issue has arisen as to whether NCAA complies with prohibition on redisclosure of student athlete records.

    a. Federal government cannot levy a sanction against NCAA directly, but under provisions cited above, schools cannot give NCAA student data for at least 5 years if it rediscloses that data without student consent.

    b. Arguably, NCAA Student-Athlete Statement (including Buckley Amendment Consent) attached imposes an independent obligation on the NCAA to keep the data private.

4. The University of Maryland and 50 other colleges and universities sponsored a proposed amendment to NCAA Bylaws to be considered at NCAA meeting of January 1997.

    a The amendment would have explicitly obligated the NCAA to afford FERPA protection to information about student-athletes received from an institution.

    b. Amendment was withdrawn before voting.

C. Media Requests for Data About Student Athletes

1. Media seeking access to student athlete records under state public records laws may rely on Red and Black, and Bauer v. Kincaid, supra in support of requests.

2. Approaches/Arguments to respond to media (as offered on NACUANET and by author)

    a. Check your own state records law as to whether it incorporates FERPA in whole or in part, or references an exemption for records otherwise protected by law.

    b. Rely on the plain language of FERPA itself, which very broadly defines student records under 1232g (a)(4)(A) (records which contain information directly related to a student and are maintained by an educational institution) and includes specific references to disciplinary records under § 1232g (b)(6) (permitting release of results of disciplinary proceedings to alleged victim of crime of violence) and § 1232g (h) (permitting inclusion in education record and release to other schools information about disciplinary action taken against a student where conduct poses a significant risk to others).

c. Rely on the DOE regulations and commentary to 1995 amendments, which state that disciplinary records are covered by FERPA and which distinguishes the Red and Black case as discipline against a student organization rather an individual student. *See* 60 Fed. Reg. 3464 (1995).

d. Rely on advisory letters of DOE on student athlete data referenced above.

e. Rely on Shreveport and fn. in Alexander, supra, as well as common sense, that loss of federal funding is equivalent to a prohibition on release.

f. Argue that provision of FERPA authorizing release pursuant to a court order should apply only when the information is sought in another proceeding (e.g., personal injury, malpractice, criminal action) for a purpose other than disclosure of the private information.

g. Argue that the court must do a balancing test to weigh the privacy rights of students before releasing the information and should hear from the affected students or their legal representatives before issuing a decision.

h. Argue that redaction of student names from reports sent to NCAA is not required under FERPA and/or is not a proper solution unless it actually provides meaningful privacy protection to the students.

i. Ask student athletes to sign waiver releasing data.

III. Release of Student Records Without Consent

A. Statutory/Regulatory Background

1. FERPA was amended as part of the Improving America's Schools Act ("IASA") effective October 20, 1994. The amendments dealt principally with release of educational records without consent. These amendments:

a. Add a provision conditioning the receipt of federal funding for State Educational Agencies ("SEA") on the SEA permitting parent/eligible students to inspect and review education records maintained by the SEA, § 1232g (a)(1)(B);

b. Allow non-consensual disclosure of education records to officials in the state juvenile justice system if authorized by state statute, § 1232g (b)(1)(E);

c. Authorize disclosure of educational records pursuant to subpoena without notice to the parent/eligible student if the subpoena is for federal grand jury or other law enforcement purposes and the subpoena directs the institution not to disclose its existence or contents to the student whose records are sought, § 1232g (b)(1)(J);

d. Prohibit an educational institution from releasing educational records to a third party for at least five years if the third party violates non-disclosure requirements, § 1232g (b)(4)(B); and

e. Authorize information to be included in educational records and released to school officials in other schools who have legitimate educational interests in the behavior of students who have been disciplined for conduct that posed a significant risk to the safety or well being of the student, other students, or other members of the school community. § 1232g (h).

2. FERPA regulations were amended effective December 23, 1996 to implement IASA and "eliminate unnecessary requirements, reduce regulatory burden, and incorporate several technical changes." 61 Fed. Reg. 59, 292 (Nov. 21, 1996). The new regulations:

a. Add several provisions incorporating statutory changes above (cites are provided in individual sections below);

b. Eliminate the requirement that institutions have a formal written policy and replace it with an expanded notice of rights to students under FERPA; this annual notice must include the school's definitions of "school official" and "legitimate educational interests," assuming the school permits the release of educational records to its school officials. 34 C.F.R. § 99.7(a)(3)(iii).

c. Adds a provision allowing an institution to release educational records in a legal action against the parent/eligible student if the records are relevant to the court action and the school has given advance notice to the parent/eligible student. § 99.31(a)(9)(iii).

B. Definitions of "School Officials"/"Legitimate Educational Interests"

1. The amended regulations include this requirement in the annual notification to students:

> *If the educational agency or institution has a policy of disclosing educational records under § 99.31 (a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. 34 C.F.R. § 99.7 (a)(3)(iii).*

2. A model notice (not to be codified in C.F.R.) which is included in the Federal Register defines "school officials" and "legitimate educational interests" as follows:

> *One exception which permits disclosure without consent is disclosure to school officials with legitimate educational interests. A school official is a person employed by the university in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the university has contracted (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.*
>
> *A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.* 61 Fed. Reg. 59298 (Nov. 21, 1996).

a. This definition of school official is quite broad and encompasses various categories of individuals discussed over NACUANET during the past year, e.g., student peer advisors, student employees, temporary employees, consultants.

(1) Question: Is release of student records to law enforcement officials as referenced in model notice above permissible when they are conducting criminal investigations for law enforcement purposes as opposed to investigations for internal disciplinary purposes?

b. The definition of "legitimate educational interests" is also appropriately broad. Discretion afforded institutions to determine when a legitimate educational interest exists leaves open possible debate on campus about appropriate access. For example:

(1) Faculty on admissions/scholastic standing/ or student behavioral committees must have access to appropriate student files to fulfill committee responsibilities. Should faculty also have access without student consent to student files of advisees and/or of all students enrolled in their classes?

(2) How much access do faculty need to disability/reasonable accommodation data about disabled students in order to fulfill faculty responsibilities?

C. Release of Disciplinary Records Where Student Poses Risk

1. As part of IASA, FERPA has added the following new subsection:

> *Nothing in this section shall prohibit an educational agency or institution from – (1)including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed significant risk to the safety or well being of that student, other students, or other members of the school community; or (2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.* § 1232g (h).

2. The DOE regulations treat these changes as a matter of health and safety emergencies under § 99.36. *See* 61 Fed. Reg. 59294 (Nov. 21, 1996). (DOE defends its decision to include this requirement as health and safety exception to consent rather than stand alone provision.)

3. Interpretation/Practical Implications

   a. Notwithstanding Red and Black, supra, FERPA historically has been understood to cover student disciplinary records based on its broad definition of student records. The new language in the statute cited above evidences direct congressional intent to include disciplinary records within the definition of education records.

   b. The language permitting the release of certain disciplinary records to school officials of other schools represents a practical change in how schools comply with FERPA.

(1) Other language in the statute theoretically already permitted the release of disciplinary information to officials in other schools. *See § 1232g (b)(1)(B) ("Officials of other schools or school systems in which the student seeks or intends to enroll . . .").*

(2) However, as a practical matter, most universities probably have not interpreted this provision to allow the release of disciplinary records. If utilized at all, the provision generally related to the release of an official student transcript without consent.

D. Other Releases For Emergency Purposes

1. Prior to 1988, FERPA regulations set forth a four part test for determining whether the emergency exception applied. These factors included the seriousness of the threat to health and safety; the need for the information to meet the emergency, whether the parties to whom the information disclosed are in a position to deal with the emergency; and, the extent to which time is of the essence in dealing with the emergency. 34 C.F.R. § 99.36 (1986).

2. The regulations were amended in 1988 based on DOE's belief that "educational agencies and institutions are capable of making those determinations without the need for federal regulation." 53 Fed. Reg. 11957 (1988). The regulations since 1988 have stated as follows:

   > *(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of a student or other individuals.*
   >
   > *(b) Paragraph(a) of this section shall be strictly construed. 34 C.F.R. § 99.36.*

3. This emergency exception was the subject of a recent Second Circuit opinion, Brown v. Oneonta, N.Y., Police Department, et. al., 106 F.3rd 1125 (2d Cir. 1997).

   a. Facts – Black students brought class action against employees of State University of New York College at Oneonta ("SUCO") under section 1983 for releasing names and addresses of black male students to law enforcement officers looking for a black male suspect with a knife, who attacked an elderly woman in her home and fled toward the campus. The director of SUCO's computer department

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and the vice president for administration released the list requested by the police, believing that it was necessary to the conduct of a lawful criminal investigation and appropriate to protect students on campus, who might be in danger since the suspect could be in the dormitories or elsewhere on campus.

b. Procedural history – The district court refused to grant any defendant immunity from the FERPA related claims on defendant's motion for summary judgment because a reasonable state college official should have known that such release would violate the rights of students attending the school. 106 F.3rd at 1129. On application for rehearing, the district court adhered to its original decision. *Id.*

c. Holding – Based on its reading of FERPA's emergency exception, 20 U.S.C. § 1232g (b)(1)(I) and the regulations quoted above, 34 C.F.R. § 99.36, the Court of Appeals held that the school officials were entitled to qualified immunity because it was unclear whether FERPA's emergency exception allowed release of the list and therefore no clearly established right of the plaintiffs was infringed. 106 at F.3rd at 1128.

4. *See Court Clears SUNY Official Who Released List of Black Students, Chronicle of Higher Education, Feb. 28, 1997, p. A44.* This article discusses the controversy created on campus by the school official's decision to release the list of names and the resulting discipline imposed upon the administrator who made the decision to release the names.

E. Release Pursuant to Subpoena or Court Order

1. Notice Requirements

a. IASA amendments to FERPA permit release of student records pursuant to subpoena or court order without notice to students if subpoena is for federal grand jury or other law enforcement purposes and directs that no disclosure be made to the student. *§ 1232g (b)(1)(J)(i) and (ii).*

b. DOE regulations were amended at 34 C.F.R. § 99.31(a)(9) to reflect statutory changes. Regulations now state:

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

> *(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with –*
>
> *(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or*
>
> *(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contests of the subpoena or the information furnished in response to the subpoena not be disclosed.*

c. Note that the "no notice" provision applies only to federal grand jury and other law enforcement subpoenas and only if the subpoena directs that there be no disclosure to the student.

2. Practical tips for responding to subpoenas

   a. Determine whether subpoena is "lawfully issued," as required under § 1232g (b)(2)(B).

      (1) Subpoena issued by state court in one state is generally not valid in another state, unless issued pursuant to a uniform law governing both states. E.g., child support enforcement laws.

      (2) A subpoena issued by a federal court in one state is generally not valid in another state (*see*, Rule 45(e) of the Federal Rules of Civil Procedure), unless another federal statute authorizes nation-wide service of process. E. g., federal grand jury testimony in criminal matters.

   b. Determine whether subpoena allows sufficient time to give students advance notice.

      (1) This requirement applies to all subpoenas except those discussed under § 99.31(a)(9) above.

      (2) FERPA does not specify how much notice is required.

(3) Institutions must make their own determinations as to what constitutes reasonable notice (e.g., 5, 10, 14 days ?).

c. If subpoena does not meet requirements of a. and/or b. above, contact issuing attorney by letter or phone to explain that FERPA prohibits compliance with the subpoena.

(1) If subpoena is issued by a court without jurisdiction (i.e., not lawfully issued), explanation to issuing attorney is sufficient.

(2) If subpoena is issued by a court with jurisdiction, but does not allow sufficient time for reasonable notice to student, institution arguably should bring motion to quash the subpoena.

(3) However, this formal approach can be unduly burdensome for an institution and typically is not necessary. Most issuing attorneys will accept subpoenaed records after date of compliance when informed of notice requirements under FERPA.

(4) Court appearance by an educational institution may be necessary where subpoena compels attendance by a records custodian at a court hearing in the very near-future and issuing attorney refuses to excuse records custodian based on notice requirement.

d. If subpoena meets requirements of a. and b. above, but student asks an educational institution not to release student records, the school should inform the student that it is his/her burden to object to the court.

3. Legal Actions by School Against Student

a. Regulations were also amended in 1996 to allow educational institutions to use student records in legal actions initiated by school against student if:

(1) records are relevant to action; and
(2) school complies with requirement to make reasonable effort to notify student in advance of compliance. 34 C.F.R. § 99.31 (9)(iii).

b. For use of student records in actions by student against school, *See Section F below on "Implied Waiver of Consent."*

F. Implied Waiver of Consent

1. Legal actions by student against school

   a. Commentary to 1996 regulations states FERPA's position (as previously outlined in advisory letters) regarding release of student records in legal actions by a student against the school. Commentary states:

   > *Discussion: While FERPA does not directly address this issue, the Department interprets FERPA to allow an educational agency or institution to infer the parent's or student's implied waiver of the right to consent to the disclosure of information from the student's education records if the parent or student has sued the institution. The Secretary believes this interpretation is sound because an educational agency or institution must be able to defend itself if a parent or student has initiated legal action against the agency or institution. This interpretation, however, does not place a requirement on educational agencies or institutions, and thus it is not included in regulations. Changes: None*
   >
   > 61 Fed. Reg. 59294 (Nov. 21, 1996)

2. Other adversarial situations between student and school

   a. In a determination issued in Feb. 1997, DOE has expanded its interpretation of implied waiver to cover other adversarial situations between student and school short of litigation.

   b. Reversing its earlier determination, DOE found that Johns Hopkins University did not violate FERPA when it copied a third party on its response to a student who first copied the third party on its complaint letter to school. The letter which is attached as Appendix 4, states:

   > *Therefore, we believe that if a student has taken an adversarial position against an institution, made written allegations of wrongdoing against the institution, and shared this information with third parties, the institution must be able to defend itself. In order to defend itself, it would be difficult for an institution to provide a response*

without referring to the student's education records. Letter at p. 2.

3. Oral disclosures/allegations by student

   a. Question arose on NACUANET as to whether implied waiver of consent applies when student takes adversarial position against school by orally disclosing to media information from his/her student records.

   b. DOE presumably would say no based on attached Feb. 1997 letter, which requires "written allegations of wrongdoing against the institution" for implied waiver to be present.

   c. Other approach recommended via NACUANET is to tell media that if student were really interested in getting facts out, student would sign waiver. Without waiver, student is effectively preventing school from telling its side of story.

IV. USE OF STUDENT SOCIAL SECURITY NUMBERS

A. Legal requirements under Privacy Act (contained in PL. 93-579, which was never codified but appears under notes to 5 U.S.C. § 552a)

1. Public institution may not require student to provide social security number unless:

   a. Disclosure is required by federal law (e.g., payroll records);

   b. Disclosure is required to verify individual's identity or system of records in existence and operating before January 1, 1975 if disclosure was required under statute or regulation adopted before that date.

2. Public institution may not deny student any right, benefit or privilege because of student's refusal to disclose social security number.

3. When public institution asks student to supply social security number, it must inform student of:

   a. Whether disclosure is mandatory or voluntary;

   b. By what statutory or other authority the number is requested; and

   c. What uses will be made of the number.

B. Legal Requirements under FERPA

1. Student's Social Security number is included under definition of personally identifiable information under § 99.3.

2. Krebs v. Rutgers – 797 F. Supp. 1246 (D.N.J. 1992) – Dissemination of class rosters with student social security numbers gives rise to FERPA claim pursuant to Section 1983. Printing of student identification cards with social security numbers may give rise to FERPA claim to extent students are required to use card for services unrelated to educational functions of university.

C. Practical Application

1. Many universities use social security number as system identifier for student records.

2. Most students are willing to supply social security number.

3. A few students adamantly refuse to supply number.

   a. Public institution cannot deny them services or benefits based on that refusal;

   b. Public institution must assign them another identifier.

4. Public institution that receives social security number for employment purposes may not share number with other offices within institution unless student was notified of this use of the number and does not object.

5. Public or private institution should not post grades by social security number, nor print number on student identification card without student consent.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

LeRoy S. Rooker
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U.S. Department of Education

ANNUAL MEETING
American Association of Collegiate
Registrars and Admissions Officers
April 15, 1991

I. INTRODUCTION

In preparation for today's session, many of you submitted questions to Dick Rainsberger, who passed them along to my Office, the Family Policy Compliance Office. The Office is designated by the Secretary of Education to administer the Family Educational Rights and Privacy Act -- that is, FERPA or the Buckley Amendment. I'll refer to it as FERPA.

I've structured my presentation to provide a general review of FERPA's provisions, and I've incorporated information to respond to the questions you submitted as well as to cover some other issues that I believe will be of interest to you. First, however, I want to briefly discuss the legislative history and regulatory background of the law.

FERPA deals specifically with the education records of students and affords students certain rights with respect to those records. It was enacted in 1974, and the regulations implementing the law were first issued in 1976. In 1988, the regulations were revised to simplify and clarify the provisions and to reduce, where possible, the regulatory burden on schools. No substantive changes were made in the revised regulations. However, the Department is in the process of developing new regulations to implement an amendment to FERPA that was enacted last November as part of the "Student Right-To-Know and Campus Security Act." That law amends FERPA by adding the following provision:

> Nothing in [the FERPA statute] shall be construed to prohibit an institution of postsecondary education from disclosing, to the victim of any crime of violence (as that term is defined in section 16 of Title 18, United States Code), the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime.

At this time the Department is in the initial stages of considering this amendment, and developing an appropriate regulatory amendment.

During the remainder of my presentation, I'll first present an overview of FERPA which will briefly cover the scope, or applicability, of FERPA; its overall purpose; the scope of the definition of "education records"; and the rights afforded students by FERPA. Then I'll discuss each of the rights in more detail and cover some matters that are of particular interest to you, including (1) the FERPA implications of the use of telefax and the telephone and electronic mail in disclosing information; (2) the FERPA provisions that pertain to the disclosure of information to the parents of dependent students; and (3) the other exceptions to FERPA's consent requirement, such as, the exception that allows disclosure to comply with a lawfully issued subpoena or court order and the exception that allows disclosure of "directory information." Finally, I'll discuss some issues relating to FERPA's enforcement procedures and respond to some cross-cutting issues some of you have raised.

II. OVERVIEW

A. APPLICABILITY

FERPA applies to all schools that receive funding under most programs administered by the Secretary of Education (section 99.1). At the postsecondary school level, virtually all private and privately owned religious schools receive applicable funding through the student financial aid programs of the Department. Any institution receiving such funding must comply with FERPA.

B. PURPOSE

Overall, the purpose of FERPA is to afford parents and eligible students certain rights with respect to the students' education records. At the postsecondary school level, the rights afforded by FERPA belong to the student, not the parent. For the purpose of this presentation, therefore, I will refer only to the student.

One of you asked whether the institution may, or should, assume that a student is over 18 years of age upon entering college. The rights afforded parents and students by FERPA transfer to the student at age 18 or when the student enters an institution of postsecondary education. Therefore, from the standpoint of FERPA, an institution of postsecondary education need not be concerned with whether a student entering the institution has reached the age of 18. If the student is attending the postsecondary institution, the institution must afford the student his or her rights under FERPA. The primary rights are the right to inspect and review the education records, the right to seek to have the records amended, and the right to have some control over the disclosure of the records or personally identifiable information from the records. I'll discuss these rights in more detail later, but first I'll explain FERPA's definition of education records.

C. DEFINITION OF EDUCATION RECORDS

The law and the regulations (section 99.3) define education records as those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for an educational agency or institution. The term is broadly defined to include all records that an institution maintains concerning a student except those records that are specifically exempted by statute.

Exempted from the definition are four carefully delineated categories of records, and a fifth category -- "records that only contain information about an individual after he or she is no longer a student at that agency or institution." The four categories of exempt records are:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are--

  (i) Maintained separately from education records;
  (ii) Maintained solely for law enforcement purposes; and
  (iii) Disclosed only to law enforcement officials of the same jurisdiction.

(3) Records relating to an individual who is employed by an educational agency or institution, that---

  (A) Are made and maintained in the normal course of business;
  (B) Relate exclusively to the individual's capacity as an. employee; and
  (C) Are not available for use for any other purpose.

All records relating to a student who is also an employee of an educational agency or institution are included in the definition of education records if the student's employment is contingent on the fact that he or she is a student. For example, all records, including employment records, of a student enrolled in a work-study program are education records; likewise, all records of a student who, because he or she is a student, is employed by the educational agency or institution to serve as a teaching assistant, lecturer, or in some other capacity, are education records. Exempted from the definition are the employment records of an employee -- including, for example, a teaching assistant or lecturer -- whose employment did not result from and does not depend on the fact that he or she may also be a student at the agency or institution -- provided that these employment records are made and maintained in the normal course of business, relate exclusively to the individual in that individual's capacity as an employee, and are not available for any other purpose. In this regard, the regulations state that records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are not exempted from the definition of education records.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are--

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her own professional capacity or assisting in a paraprofessional capacity;

(ii) made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution.

While an institution is not required to give eligible students access to medical treatment records, the student may have those records reviewed by a physician or other appropriate professional of the student's choice. Under these provisions, if the student is permitted to review the medical treatment records directly or if information from the medical treatment records is disclosed to anyone other than individuals providing the treatment, the records of that student lose their protected status as "medical treatment records" and become "education records" subject to the FERPA provisions.

As I noted earlier, a fifth category of records that are exempted from the definition of "education records" are those records that only contain information about an individual after he or she is no longer a student at that agency or institution. Thus, any portions of a record that are personally identifiable to a former student and that pertain to the student's grades, attendance, or experience at the institution are subject to the provisions of FERPA, while any portions that pertain to a former student after the student's departure from the, institution are not.

D. SUMMARY OF RIGHTS

The rights afforded by the law are summarized in section 99.7 of the regulations. Section 99.7 requires that schools annually notify students currently in attendance of the rights by any means that are reasonably likely to inform them of their rights. The regulations do not, however, specify the means to be used. Most schools publish the notification in their student handbooks. However, the notification may also be given by publication in the school newspaper or by inclusion in the student's registration packet. Schools are not required by FERPA to notify former students of their FERPA rights.

The five rights, as summarized in section 99.7, are as follows:

(1) The right to inspect and review the student's education records.

(2) The right to request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and the regulations authorize disclosure without consent.

(4) The right to file with the U.S. Department of Education a complaint concerning alleged failures by the institution to comply with the requirements of the Act and the regulations.

(5) The right to obtain a copy of the institution's student records policy.

Section 99.7 states that the notification must also indicate the places where copies of the institution's student records policy are located. The regulations require each educational institution to formulate and adopt a written student records policy regarding how the institution meets the requirements of the law and the regulations. The student records policy must contain information that pertains to most of the matters I'll be discussing from here on in the presentation. I'll be referring to those requirements as I go along and will review them in their entirety later on.

Now, I will review the FERPA provisions that pertain to the rights afforded by FERPA and respond to certain questions you have raised concerning them.

III. RIGHT TO INSPECT AND REVIEW

A. INSPECT AND REVIEW PROVISIONS

Section 99.10 of the regulations states that, except as limited under section 99.12, an educational institution shall permit a student to "inspect and review" the student's education records. The section requires that the institution comply with a request for access to records within a reasonable period of time but in no case more than 45 days after it has received the request. The section also states that the institution shall respond to reasonable requests for explanations and interpretations of the records. It does not require that a student be given a copy of the records unless a failure to do so would effectively result in a denial of access. Copies would be required, for example, if a former student does not live within commuting distance of the school. Section 99.10 also states that an educational institution shall not destroy any education records if there is an outstanding request to inspect and review the records.

A participant asked about the FERPA implications of allowing students to access their grades or order transcripts over the telephone via voice response units if a confidential PIN or password is assigned to the students for that purpose. Another participant asked whether it is permissible to confirm, by telephone, information such as a grade point average if it appears obvious that the person calling is the student to whom the information relates and that the student merely wants to be certain that his or her own calculations are correct.

FERPA would not preclude an institution from disclosing information to students by telephone. An institution may exercise its own judgment on whether to disclose under these circumstances. The Family Policy Compliance Office would investigate any complaint that contained specific allegations of fact giving reasonable cause to believe that an institution had improperly disclosed information from a student's education records by telephone to an unauthorized party. And the Office recommends that institutions implement whatever procedures they deem necessary to verify the individual's identity.

Another participant asked what a school should do in the case of a student who requests access but claims to have lost all identification. The participant specifically asked whether a professor's verification of the student's identity would be sufficient and, if so, whether the verification should be written. FERPA would not preclude an institution from requiring a student to validate his or her identity. Again, it would initially be the institution's responsibility to decide what constitutes sufficient verification under the circumstances.

Finally, a participant asked whether institutions must provide copies of transcripts that are from other institutions to students who request them. FERPA affords students the right to "inspect and review" their education records. A copy of a student's transcript from another institution is an education record if it is maintained by the school at which the student is in attendance. FERPA does not require institutions to provide copies of education records unless a failure to do so would effectively result in a denial of access. An institution is generally not required to provide copies of any education records unless a student does not live within commuting distance of the institution, in which case the institution must provide a copy to a student who requests one.

Although a student has the right to "inspect and review" virtually all education records that fall within FERPA's definition of the term, there are three specific limitations on that right.

B. LIMITATIONS ON RIGHT TO INSPECT AND REVIEW

Section 99.12 of the regulations sets forth the limitations on the student's right to inspect and review the education records. The section states that if the education records of a student contain information on more than one student, the student may inspect, review, or be informed of only the specific information about himself or herself. An institution may allow a student access to the student's education records by computer or by telephone provided the institution has established procedures to ensure that the student will obtain access only to the student's own records and that a person accessing a particular student's records is, in fact, that student.

Section 99.12 also states that a postsecondary institution does not have to permit a student to inspect and review financial records of the student's parents.

Finally, a postsecondary institution does not have to permit a student to inspect and review confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if -- (i) the student has waived his or her right to inspect and review those letters and statements; and (ii) those letters and statements are related to the student's (A) Admission to an educational institution; (B) Application for employment; or © Receipt of an honor or honorary recognition. If a student has signed a waiver, the student may not, after enrolling in an institution of postsecondary education, revoke that waiver and require the institution to allow the student to inspect and review a recommendation.

Also, persons who applied for admission but were not accepted have no rights under FERPA, whether or not they filed a waiver. Individuals who are denied admission to a program of study or component unit of a college or university are not entitled by FERPA to have access to materials relating to the denied application, even if the individual subsequently enrolls at the institution to take courses for credit, to audit courses, or to pursue another program of study.

Section 99.5(c) -- "What are the rights of eligible students?" -- states:

> If an individual is or has been in attendance at one component of an educational agency or institution, the attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

In order to achieve the statutory purpose, the words "component" and "component unit" are construed very narrowly. Thus, if a student has been denied admission as a graduate student in a particular division of a post-secondary school but is accepted as an auditor or "student-at-large," the person is not considered a student with respect to the graduate school component unit. To find otherwise would give students-at-large and auditors greater rights than other persons who had applied to and been denied admission to a particular component unit. An individual who has been denied admission to a program of study but is accepted for auditing in the same department or school may have access to grades or other information regarding the audited courses -- but, again, not to the information regarding the denied admission.

IV. RIGHT TO SEEK AMENDMENT

A. CLARIFICATION OF THE RIGHT

The second right FERPA affords students is the right to seek to have their education records amended if the student believes the record to be inaccurate, misleading, or an invasion of privacy. However, FERPA does not afford a student the right to seek to have substantive decisions or educational assessments, such as grades, changed. Likewise, FERPA does not afford a student the right to seek to have an evaluation issued in lieu of a course grade, or a supplementary evaluative opinion or judgment, changed. FERPA deals only with education records. Thus, FERPA affords a student the right to seek to correct recordkeeping errors, but not to seek to overturn substantive decisions and assessments.

FERPA does not restrict the types of information institutions may maintain on students. Likewise, FERPA does not require institutions to maintain any particular records, unless, as noted earlier, there is a pending request for access.

B. INSTITUTIONS' RESPONSIBILITY TO RESPOND WITHIN A REASONABLE PERIOD OF TIME/STUDENTS' RIGHT TO A HEARING

Under section 99.20 of the regulations, an institution must decide whether to amend a record as requested within a reasonable period of time after the institution receives such a request. What would be a "reasonable period of time" in any given case could depend on many factors. It could, for example, depend on the number and the complexity of the requested amendments and on when the request was submitted and to whom it was submitted. A response to a request submitted when classes are not in session, or when the party who would ordinarily respond to the request may not be immediately available, might reasonably be delayed. Thus, the term "reasonable period of time" is not definitive.

Section 99.20 (paragraph(c)) states that if the educational institution decides not to amend a record as requested, it shall inform the student of its decision and of the student's right to a hearing.

C. HEARING REQUIREMENTS

Section 99.22 of the regulations sets forth the minimum requirements that exist for the conduct of the hearing required by section 99.20. I won't detail those provisions here but will note that although an institution must meet the minimum requirements set forth in section 99.22, FERPA does not require that the hearings conducted pursuant to it be subject to the rules that commonly pertain in a court of law, such as cross-examination of witnesses.

D. INSTITUTIONAL RESPONSIBILITY IF THE INSTITUTION DECIDES NOT TO AMEND THE RECORD/STUDENTS' RIGHT TO INSERT A STATEMENT IN THE RECORD

Section 99.21 states that if, as a result of the hearing, the educational institution decides that the information in the education record is not inaccurate, it shall inform the student of the right to place a statement in the record commenting on the contested information or stating why he or she disagrees with the decision of the institution, or both.

V. RIGHT TO CONSENT TO DISCLOSURE

A. GENERAL

The third right afforded students by FERPA is the right to consent to disclosures of education records, or personally identifiable information contained in such records, except to the extent that the Act and the regulations allow disclosures without consent. The provisions concerning a student's right to consent to disclosures are set forth in sections 99.30 and 99.31 of the regulations.

Section 99.30, paragraph (a), states that -- except as provided in section 99.31 -- an educational institution shall obtain a student's signed and dated consent before it discloses personally identifiable information from the student's education records. Paragraph (b) of the section states that the written consent must (1) specify the records that may be disclosed, (2) state the purpose of the disclosure, and (3) identify the party or class of parties to whom the disclosure may be made.

A student may also revoke his or her written consent. If a student signs a valid consent for disclosure of information to an employer, for example, and then asks the institution not to disclose any information to that employer, the institution must honor the student's request. Otherwise, the disclosure would be made without the student's consent, and the disclosure would violate the student's right to consent to disclosure. The institution, therefore, should inform the employer that it does not have a valid consent to disclose the information. The employer can then resolve the matter directly with the employee or the prospective employee.

B. DISCLOSURE TO THIRD PARTIES BASED ON TELEFAXED CONSENT OR BY TELEPHONE

Several participants asked about the FERPA implications of disclosing information to third parties on the basis of a telefaxed consent, or in response to telephone requests for information, or based on oral requests of persons who come into the office to obtain information. An institution may exercise its own judgment in deciding whether to disclose pursuant to a telefaxed consent. Also, FERPA would not preclude an institution from disclosing information to a third party by telephone, or in response to an oral request in person, provided the institution has obtained a valid consent from the student that covers the information that is disclosed.

The Family Policy Compliance Office, in administering the law, would investigate any complaint that contained specific allegations of fact giving reasonable cause to believe that an institution had improperly disclosed information from a student's education records -- either in response to a consent submitted by telefax or in response to a request received by telephone. The Office recommends that institutions that receive frequent telefaxed consents consider establishing procedures to ensure that telefaxed consents are bona fide and to require proper identification and written requests for information when possible.

C. ELECTRONIC MAIL

Last year a participant asked about the FERPA implications of electronic mail. The FERPA regulations require that an educational institution obtain a signed and dated consent before disclosing information from the student's records. This cannot be done by electronic mail because the consent would not bear the student's signature. However, an institution could disclose information by electronic mail provided the institution had obtained a valid consent and, also, provided the institution has sufficient information to convince the responsible official that the party receiving the information is a party covered by the student's consent.

D. DISCLOSURE OF COPIES OF OFFICIAL TRANSCRIPTS OF OTHER SCHOOLS

Also concerning disclosure with consent, our Office often receives inquiries on whether institutions must honor the request of a student to send a copy of the student's official transcript from another institution he or she has attended to another party. A transcript from another institution that is maintained by an educational institution is covered by the FERPA definition of "education records" and is therefore subject to the provisions of FERPA. FERPA does not require institutions to disclose any information to any party other than the student. It sets forth conditions under which institutions may disclose information to other parties without consent. An institution may honor a student's request to send a copy of the transcript to another educational institution or another party provided the institution has obtained a written consent that meets the FERPA requirements. The institution may also send a copy to another educational institution without consent under an exception to the consent requirement that allows disclosure without consent to other institutions in which a student seeks or intends to enroll -- provided certain conditions are met.

The exceptions to the requirement that educational institutions obtain written consent prior to disclosure are set forth in section 99.31. I will discuss those exceptions in the order that they appear in the section. Before moving on to those, however, I'll discuss two issues that pertain to disclosure with consent.

E. DISCLOSURE TO PUBLIC/MEDIA

A participant asked whether it is permissible to discuss information from a student's records concerning grades or disciplinary actions publicly -- for example, in the media -- without the student's consent if a law suit has made it a matter of public record. None of the exceptions to the section 99.30

consent requirement would allow an institution to discuss a student's education records publicly -- even if a law suit has made the information a matter of public record. Also, a school official may not infer that a student's public discussion of a matter constitutes an implied consent for the school official to disclose information in reply. The correct response to a member of the media by a school official who wishes to respond in these circumstances is that he or she will do so if the inquirer presents a properly executed consent form from the student or former student.

F. DISCLOSURE OF INFORMATION ON DECEASED STUDENTS OR FOR HISTORICAL RESEARCH

The Office often receives inquiries pertaining to the education records of deceased individuals, or of individuals who may be living but whose records are of interest for historical research purposes, or of individuals who attended the institution prior to 1974. Under common law regarding privacy rights, the privacy interests of an individual expire with that individual's death. Likewise, the disposition of records held by an institution pertaining to a deceased individual is not a FERPA issue. Survivors have no cause of action under FERPA and no right to obtain disclosure from an institution under FERPA. Since FERPA would no longer apply, the institution may exercise discretion in deciding whether to disclose to the survivors or any other requesting party.

To respond specifically to a question one of you raised, FERPA would not apply to records about a former student that are 100 years old, based on the assumption that such former student is deceased, and FERPA would not preclude housing such records in the archives of a library for public research. It would be the institution's responsibility to satisfy itself that a former student is deceased before disclosing information. Because FERPA does not apply to the education records of deceased individuals, it does not address the question of what an institution which wishes to disclose information on a deceased individual should require by way of verification of the death. FERPA would apply only if it turned out that the individual was not in fact deceased. Our Office would investigate any complaint that contained specific allegations of fact giving reasonable cause to believe that information had been improperly disclosed, even if the student attended the institution a long time ago.

Concerning the records of individuals who may be living but whose records are of interest for historical research purposes, there is no exception in FERPA that would allow the information -- other than "directory information" -- to be disclosed to the public, or a relative, for such purposes without consent. In the case of "directory information," that information could be disclosed on a living individual provided the individual, at his or her last opportunity as a student, did not exercise the right to refuse to allow the institution to disclose the information. Also, "directory information" could be disclosed without consent from the records of individuals whose last period of attendance at the institution ended prior to the passage of FERPA in 1974.

I'll more fully cover the FERPA provisions that pertain to directory information in general and to this latter issue in particular at appropriate points in the remainder of my discussion.

VI. EXCEPTIONS TO RIGHT TO CONSENT

A. GENERAL

Concerning the exceptions that allow disclosure without consent, section 99.31 states that an educational institution may disclose personally identifiable information from an education record of a student without the consent required by section 99.30 if the disclosure meets one or more of 12 exceptions. I should stress that these exceptions are permissive and not mandatory.

B. DISCLOSURE TO SCHOOL OFFICIALS

The first exception to the consent, requirement is section 99.31(a)(1). This exception allows an educational institution to disclose information from an education record without consent if the disclosure is to school officials, including teachers, within the institution whom the institution has determined to have legitimate educational interests.

Under section 99.6 of the regulations, educational institutions are required to formulate and adopt a written policy regarding how the institution meets the FERPA requirements. I won't fully review what the policy must contain at this point but will only review the provision that is pertinent to disclosures to school officials. That provision requires that the institution's student records policy include a statement indicating whether the institution has a policy of disclosing information under section 99.31(a)(l) -- and, if so, a specification of the criteria for determining which parties are school officials and what the institution considers to be a legitimate educational interest. An institution's student records policy could, for example, specify as a criterion that student workers are considered school officials. A student worker could then obtain access to the education records of other students if the student were performing a task or function that fits the criteria specified in the policy for determining what constitutes a legitimate educational interest. Sample criteria would be:

- Performing a task related to a student's education.
- Performing a task that is specified in his or her position description or by contract agreement.

If the appropriate criteria are included, information could be disclosed to students serving on official committees, for example. Also, certain individuals who are technically not employees of the institution but who provide services to the institution under contract or retainer may, if specified under the criteria in the institution's FERPA policy, be considered school officials. Such persons may include an outside attorney providing legal services to the institution, or an insurance representative.

The regulations implementing FERPA do not establish criteria for determining the limits of what may be considered a legitimate educational interest. Therefore, we proceed on a case-by-case basis in making determinations as issues arise.

One of you asked about disclosures of academic records to specific departments of the institution, for example an athletic department or a public safety department. Academic records are "education records" and, as such, may be disclosed to school officials who have been determined to have a legitimate educational interest in the information provided the disclosure falls within the criteria established in the policy. As an example, criteria could be established that would encompass disclosure to an athletic director of the academic record of a student for the purpose of determining the athlete's continued eligibility to participate in the athletic activity.

An institution which has a campus security department that maintains its records so as to exempt them from the FERPA definition of "education records" could not disclose information from a student's "education records" to the campus security department without jeopardizing the exemption. One of the conditions that must exist in order for the records of a campus law enforcement unit to be exempt from the definition of "education records" is that the records must be kept apart from students' education records. An institution which has a campus law enforcement unit that does not maintain its records so as to exempt them from the definition could disclose information to those officials of the unit whom the institution has determined to have a legitimate educational interest under section 99.31(a)(1).

Our Office sometimes receives inquiries relating to the use of computer systems by school officials. The concerns are with those systems that do not have the capability to restrict viewing to officials who have been determined to have a legitimate educational interest. No formal FERPA guidelines, standards, or interpretations relating to this matter have been issued by the Family Policy Compliance Office. Although our Office is responsible for providing technical assistance to educational agencies and institutions in complying with FERPA, the development of technical guidelines, standards, or methods for restricting access to data in computer systems does not fall within the scope of this responsibility. However, following are some comments and suggestions.

If appropriate criteria have been included in a university's student records policy to establish that a student worker is a school official and has a legitimate educational interest, then it would not matter, for example, that the student worker rather than a dean, a faculty member, advisor, or some other "school official" is the one who does the actual accessing, initial viewing, and ultimate application of the information. The important consideration is the extent to which an individual would have access to information in which he or she had no legitimate educational interest and the extent to which the individual is instructed as to the confidentiality requirements of FERPA.

It is an institution's responsibility to ensure that students' FERPA rights are not violated. You might, therefore, want to establish a procedure for instructing and reminding "school officials," including student workers, of the confidentiality requirements of FERPA at the time they are initially given access via a computer system. As a component of this procedure, you may want to inform "school officials" of the criteria the institution has established in its student records policy for "legitimate educational interest."

C. DISCLOSURE TO SCHOOLS IN WHICH A STUDENT SEEKS OR INTENDS TO ENROLL

The second exception to the consent requirement (section 99.31(a)(2)) allows an educational institution to disclose information without consent to officials of other schools where a student seeks or intends to enroll -- provided certain conditions are met. The conditions are set forth in section 99.34. Briefly, the institution may forward the information, including transcripts, if it includes in its student records policy a statement that it forwards education records to other agencies or institutions that request the records and in which the student seeks or intends to enroll. If the institution does not have a policy with this kind of provision, the institution must make a reasonable attempt to notify the student of the request for disclosure. The regulations also specify in section 99.34 that an institution making such a disclosure must, if the student so requests:

(1) Provide the student with a copy of the record that was disclosed, and

(2) Give the student an opportunity for a hearing to challenge the accuracy of the record.

Section 99.34 states that an institution may, under the same conditions, disclose an education record of a student "in attendance" to another educational institution where the student is also enrolled.

One question from last year's conference concerned high school students who are not yet 18 and who enroll in courses at an institution of postsecondary education and apply the credits to fulfill needed units at the high schools in which the students are also enrolled. As noted earlier, the rights accorded to, and consent required of, parents under FERPA transfer from the parents to the student when a student reaches age 18 or enters a postsecondary institution. An institution of postsecondary education may send a transcript of the grades of the student to the high school to fulfill needed units at the high school without the student's consent provided the conditions of section 99.34 have been met. The disclosures can be made under paragraph (b) of section 94.34, which, as noted above, states that an institution may -- under the conditions set forth in paragraph (a) of the section -- disclose an education record of a student "in attendance" to another educational institution where the student is also enrolled.

D. DISCLOSURE TO FEDERAL AND STATE AUTHORITIES FOR AUDIT/ EVALUATION/COMPLIANCE ACTIVITIES

The third exception (section 99.31(a)(3)) to the consent requirement allows disclosure without consent to authorized representatives of the Comptroller General of the United States, the Secretary of Education, or State and local educational authorities, under certain conditions. The conditions are set forth in section 99.35. Briefly, the officials may have access in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of, or compliance with, Federal legal requirements that relate to those programs. Also, the information that is disclosed must be appropriately protected by the officials from improper disclosure and must be destroyed when no longer needed for the purpose for, which it was disclosed.

E. DISCLOSURE IN CONNECTION WITH FINANCIAL AID

The fourth exception (section 99.31(a)(4)) allows disclosure without consent in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

- Determine eligibility for the aid,
- Determine the amount of the aid,
- Determine the conditions for the aid, or
- Enforce the terms and conditions of the aid.

F. DISCLOSURE TO STATE AND LOCAL AUTHORITIES PURSUANT TO STATE STATUTE ADOPTED BEFORE NOVEMBER 19, 1974

A fifth exception (section 99.31(a)(5)) allows disclosure without consent to State and local officials or authorities if a State statute adopted before November 19, 1974 specifically requires disclosure to those officials and authorities.

G. DISCLOSURE FOR STUDIES FOR OR ON BEHALF OF EDUCATIONAL INSTITUTIONS

A sixth exception (section 99.31(a)(6)) allows disclosure to organizations conducting studies for, or on behalf of, educational institutions to:

- Develop, validate, or administer predictive tests;
- Administer student aid programs; or
- Improve instruction.

H. DISCLOSURE TO ACCREDITING ORGANIZATIONS

The seventh exception (section 99.31(a)(7)) allows disclosure to accrediting organizations to carry out their accrediting functions.

I. DISCLOSURE TO PARENTS OF A DEPENDENT STUDENT

Several participants asked questions concerning the eighth exception (section 99.31(a)(8)). That exception allows disclosure without consent to the parents of a dependent student as defined in section 152 of the Internal Revenue Code of 1954. An institution is not required to disclose information from the student's education records to the parents of a dependent student but may exercise its discretion to do so. If the student is a dependent of only one parent, an institution may disclose information without consent only to that parent.

A participant asked whether dependent students can require that institutions not disclose information from their education records to their parents. Again, an institution may exercise its own discretion on whether to disclose the information. A dependent student has no right under FERPA to demand that the institution withhold the information.

An institution that chooses to disclose information from the education records of a dependent student to that student's parents is not limited in terms of "how much" or "how often" the information may be disclosed. Neither does FERPA limit the "types" of information that may be disclosed from the education records of such students.

A participant asked about the FERPA provisions that pertain to disclosures by vocational program personnel to parents of students who are in the program. The participant states that individuals in vocational programs are not in a position to determine whether a student is a dependent of a parent who calls. Another participant also asked for information on how institutions should verify a parent's identity or status.

FERPA does not address the issue of verification of a student's status as a dependent student or of a parent's identity. The means of verification is left to the institution. It is the responsibility of the institution to ensure that information is not improperly disclosed to the parents of students. The responsibility of the Family Policy Compliance Office is to investigate and resolve complaints of violations of FERPA and to provide technical assistance to institutions in complying with the law. So, if a complaint were received from a student that information had been disclosed to the student's parents in violation of the student's rights, our Office would investigate to determine whether a violation had occurred, and, if so, request that steps be taken to preclude a recurrence.

One participant asked whether it is sufficient to inform students in the school catalog that unless they sign a form to the contrary, all students are assumed to be dependents of the parents. Under FERPA, it's the responsibility of the educational institution to ensure that students' rights are protected in accordance with the provisions of the law. If the students at an institution are predominantly dependent students, the likelihood of a violation occurring as a result of a practice such as that cited by the participant might not be as great as at another institution. Nevertheless, the practice could result in a violation of FERPA.

FERPA would not preclude an institution from "requiring" students to sign a statement declaring their tax status -- for example, "I am/am not claimed as a dependent for tax purposes" -- and this would be recommended over merely publishing a statement in the catalog that makes it incumbent on the student to declare himself not a dependent for tax purposes. Again, however, it would be the institution's responsibility to ensure that violations do not occur and to develop whatever verification procedures are deemed necessary toward that end.

J. DISCLOSURE TO COMPLY WITH JUDICIAL ORDER OR LAWFULLY ISSUED SUBPOENA

The ninth exception (section 99.31(d)(9)) to the consent requirement allows disclosure without written consent if the disclosure is to comply with a judicial order or lawfully issued subpoena -- provided the institution has made a "reasonable effort" to notify the student in advance of compliance.

One of you asked for clarification of the notification requirement -- specifically whether there have been any definitions or court cases on what constitutes "reasonable effort to notify" prior to compliance with a subpoena. I am not aware of any court cases dealing with the issue. However, under FERPA, if a subpoena is received, the institution must make a "reasonable effort" to notify the student in advance of any disclosure pursuant to that subpoena. What would constitute a "reasonable effort" would, of course, depend on the circumstances. In general, however, if the subpoena has a compliance date that would preclude making a "reasonable effort" -- for example, if it requires compliance within a day or two -- the institution should request an extension of the compliance date from the proper authority.

One of you asked whether an institution must honor a subpoena and what determines whether a subpoena is valid. Another participant asked whether there is a difference between a subpoena and a court order in terms of an institution's obligation to comply. FERPA does not specify what a subpoena must include in order for an institution to disclose information without consent. Further, FERPA does not require institutions to disclose information to comply with a lawfully issued subpoena or court order. FERPA provides the conditions under which institutions may comply. The only FERPA conditions are that a subpoena must be "lawfully issued" and that a reasonable effort must be made to notify the student in advance of compliance with either a lawfully issued subpoena or a court order. You should consult State law if questions arise as to whether a subpoena is lawfully issued.

K. DISCLOSURE IN CONNECTION WITH A HEALTH OR SAFETY EMERGENCY

The tenth exception (section 99.31(a)(10)) to the consent requirement allows disclosure without consent in connection with a health or safety emergency under the conditions described in section 99.36. One of you asked, in effect, for information on how other schools handle disclosures under this exception and also whether FERPA requires any specific documentation. Our Office does not maintain data on how other schools handle the exception, and FERPA does not contain any documentation requirements.

The statute, in setting forth the conditions under which personally identifiable information from an education record or records can be disclosed without consent, states that such a disclosure may be made "subject to regulations of the Secretary in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons." The original regulations required that educational agencies or institutions include four specific criteria in the factors to be taken into account in determining whether personally identifiable information from the education records of a student could be disclosed under the exception. The Secretary decided to remove the nonstatutory criteria from the 1988 revised regulations based on his belief that educational agencies and institutions are capable of making those determinations without the need for Federal regulation.

The four specific criteria that were removed are:

(1) the seriousness of the threat to the health or safety. of the student or other individuals;

(2) the need for the information to meet the emergency;

(3) whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) the extent to which time is of the essence in dealing with the emergency.

L. DISCLOSURE OF DIRECTORY INFORMATION

The eleventh exception (section 99.31(a)(11)) -- one to which I have earlier referred -- allows disclosure of information the institution has designated as "directory information," under certain conditions. The conditions are set forth in section 99.37. Section 99.37(a) provides that an institution may disclose directory information if it has given public notice to students in attendance of: (1) the types of personally identifiable information that the institution has designated as directory information; (2) a student's right to refuse to let the institution designate any or all of those types of information about the student as directory information; and (3) the period of time within which a student has to notify the institution in writing that the student does not want any or all of those types of information about the student designated as directory information. Paragraph (b) of the section states that an educational institution may disclose directory information about former students without meeting the conditions in paragraph (a) of the section. Several of you asked questions concerning the directory information exception.

Section 99.3 of the FERPA regulations defines "directory information" as information contained in an education record of a student which would generally not be considered harmful or an invasion of privacy if disclosed. The definition then lists items that the standard "includes but is not limited to." The items encompass information that might generally appear in a school yearbook -- for example, the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

The standard, together with the list of items, should provide guidance for educational institutions in determining what may be designated as "directory information." For example, disclosure of a social security number would generally be considered an invasion of privacy and it could not, therefore, be designated as directory information. Also, a student's class standing could generally not be disclosed -- unless, however, it could be categorized as an award received, such as "valedictorian."

One of you asked whether the fact that a conferred degree has been revoked could be disclosed without consent if the institution has properly designated "degrees received" as "directory information." We believe that disclosure of the fact that a degree has been revoked would generally be considered an invasion of privacy and that the information could not, therefore, be disclosed as directory information. However, if, for example, an employer of the student asks an institution to confirm that a student received a certain degree after the degree has been revoked, the institution may say that the record does not show that the student holds that degree.

Another participant asked a question that pertains to the disclosure of directory information on students that serve the public as part of their training in vocational programs but then leave the program. The participant asked about the FERPA provisions that would pertain to the disclosure of the fact that a particular student has left the program to a member of the public who calls to ask for an appointment with that student.

Provided the institution has properly designated field of study as directory information and the student has not exercised the right to require the institution to withhold the information, the program could inform the caller that the student is no longer in that field of study. If the student has asked that the information not be disclosed, then the program could not inform the caller that the individual is no longer in the program. The most that could be said is that there is no one there by that name. If the caller requests further information, he or she could be referred to the office which is responsible for overseeing disclosures of directory information for an appropriate response. I responded to the question earlier from the standpoint of a particular case that involved a student who was a dependent student. The institution should consider providing the program with a listing of those students in the program who have asked that directory information not be disclosed.

A question from last year's session pertained both to the "directory information" exception and to the exception that allows disclosure to institutions in which a student seeks or intends to enroll, which I discussed earlier. The participant asked, in effect, for clarification of the exception as it pertains to disclosures to other institutions of information concerning students who have been expelled for Honor Council violations. A student's current academic standing -- such as "ineligible to return" -- could not be designated as directory information because the disclosure of the information would generally be considered an invasion of privacy if disclosed. Also, an institution could not designate "in good standing" as directory information because, by a process of elimination, those students who are "not in good standing" could be identified.

However, this information could be disclosed without consent to other institutions in which a student seeks or intends to enroll under the conditions set forth in section 99.34, as discussed earlier. As I've also pointed out, FERPA does not "require" an institution to disclose information to any party. Instead, it sets forth the conditions under which an institution "may" disclose information without consent. So, an institution "could" disclose information concerning an expelled student's standing to an institution in which the student seeks or intends to enroll -- provided the institution has met the conditions set forth in section 99.34.

Several participants asked for clarification of the provisions of the "directory information" exception as it pertains to former students. Paragraph (a) of section 99.37, which sets forth the conditions under which directory information may be disclosed, specifically states that notice must be given to "students in attendance." Paragraph (b) specifically states that an institution may disclose directory information about "former students" without meeting the designation and notification conditions of paragraph (a). If a student, within the specified time period during his or her last opportunity as a student in attendance, requests under section 99.37 that directory information not be disclosed, the institution must honor that request until otherwise notified. However, an institution is not required by FERPA to honor a request by a former student that directory information not be disclosed. Thus, the directory information provision does not apply to former students who attended institutions prior to the passage of FERPA in 1974.

A participant at last year's session asked whether the interpretation could be changed to "allow disclosure of directory information without consent on all former students -- even those who had requested, as students in attendance, that the information not be disclosed. The law affords a student the right to consent to disclosures from the student's education records unless one of the exceptions applies. Former students as well as students currently in attendance have this right under the law. The "directory information" exception allows an institution to disclose "directory information" provided certain conditions are met and provided the student in attendance has not exercised the right to refuse to let the institution disclose the information without consent. There is no provision in FERPA that would allow an institution to refuse, or fail, to honor the request of a student in attendance that the institution not designate information about the student as directory information. A disclosure of the information under those circumstances would constitute a disclosure without the student's consent.

An institution may disclose properly designated "directory information" without consent provided the student has not exercised the right to refuse to allow the institution to designate any or all of those types of information about the student as directory information. FERPA does not otherwise restrict the disclosure of "directory information."

M. DISCLOSURE TO THE STUDENT

The twelfth, and last, exception (section 99.31(a)(12)) is not controversial. It allows an institution to disclose information from a student's education records to the student without meeting the written consent requirements of section 99.30.

I have now covered the major provisions of the three primary rights afforded students by FERPA -- the right to inspect and review the records, the right to seek amendment of the records, and the right to consent to disclosures of information from the records unless the disclosure falls within one or more of the exceptions under section 99.31. Two provisions that follow section 99.31 in the regulations pertain to disclosures made under the exceptions. The two provisions concern a recordkeeping requirement and limitations on the redisclosure of information.

VII. RECORDKEEPING REQUIREMENT/REDISCLOSURE LIMITATIONS

The first provision is a recordkeeping requirement set forth in section 99.32 immediately following the exceptions in section 99.31. Briefly, section 99.32 requires an institution to maintain a record of each request for access to, and each disclosure of, personally identifiable information from the education records of each student. The section requires that such a record be maintained with the education record as long as the education record is maintained. The section also requires that for each request or disclosure the record must include the parties who have requested or received personally identifiable information from the education records and the legitimate interests the parties had in requesting or obtaining the information.

Paragraph (b) of section 99.32 pertains to the statement in section 99.31 that an educational institution may disclose personally identifiable information without consent if the disclosure meets "one or more" of the exceptions. Parties that receive information under one of the exceptions may redisclose to other parties that could otherwise obtain disclosure under an exception in accordance with an understanding authorized under, and the conditions set forth in, section 99.33. If an institution discloses information with that understanding and under the specified conditions, the record of the disclosure required under section 99.32 must include the names of the additional parties to whom the receiving party may disclose the information on behalf of the educational institution, and the legitimate interests under section 99.31 which each of the additional parties has in requesting or obtaining the information.

Section 99.32, paragraph (c), states that the following parties may inspect the record of disclosure. (1) the student, (2) the school officials who are responsible for the custody of the records, and (3) those parties authorized in section 99.31(a)(1) and (3) for the purpose of auditing the recordkeeping procedures of the institution. According to paragraph (d) of section 99.32, the recordkeeping requirement does not apply if, the request was from, or the disclosure was to: (1) the student; (2) a school official under section 99.31(a)(1); (3) a party with written consent from the student; or (4) a party seeking directory information.

A participant asked whether this provision of the FERPA regulations requires an institution to electronically log the information about the request for access, or the disclosure, if the institution's primary files are computerized by institutional policy. As I noted, the regulations require that the record be maintained with the education records as long as the records are maintained. Therefore, strictly speaking, the information should be electronically logged. However, since the primary purpose of the record is to provide the student with information about requests for access to and disclosures from the student's education records, the FERPA requirement would be satisfied by any method that would ensure that when the custodian of the education record affords the student access to the education record, the custodian also gives the student access to a record of any requests for access to or disclosures from the record.

The second provision that pertains to disclosures made under the exceptions to the consent requirement is section 99.33. That section, briefly, sets forth certain limitations and conditions that apply to the redisclosure of information that is disclosed from an education record, either with prior written consent or under one of the exceptions in section 99.31.

VIII. RIGHT TO OBTAIN A COPY OF THE INSTITUTION'S STUDENT RECORDS POLICY

The last two rights afforded students by FERPA -- aside from the primary rights of access, amendment, and control over disclosure -- are the right to obtain a copy of the institution's student records policy and the right to file a complaint with the U.S. Department of

Education. First, I'll review what the student records policy must contain under the requirements set forth in section 99.6 of the regulations. Then I'll review the complaint and enforcement process and related issues.

Section 99.6 requires each educational institution to adopt a policy regarding how the institution meets the requirements of the Act and the regulations. The policy must include the following:

(1) How the agency or institution informs students of their rights, in accordance with section 99.7 (which I discussed earlier).

(2) How a student may inspect and review education records under section 99.10, including at least:

    (i) The procedure the student must follow to inspect and review the records;

    (ii) With an understanding that it may not deny access to education records, a description of the circumstances in which the institution believes it has a legitimate cause to deny a request for a copy of the records;

    (iii) A schedule of fees (if any) to be charged for copies; and

    (iv) A list-of the types and locations of education records maintained by, the institution, and the titles and addresses of the officials responsible for the records;

(3) A statement that personally identifiable information will not be released from an education record without prior written consent of the student, except under one or more of the conditions described in section 99.31;

(4) A statement indicating whether the institution has a policy of disclosing personally identifiable information under section 99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the institution considers to be a legitimate educational interest;

(5) A statement that a record of disclosures will be maintained as required by section 99.32, and that a student may inspect and review that record;

(6) A specification of the types of personally identifiable information the institution has designated as directory information under section 99.37; and

(7) A statement that the institution permits a student to request correction of the student's education records under section 99.20, to obtain a hearing under section 99.21(a), and to add a statement to the record under section 99.21(b)(2).

Paragraph (b) of section 99.6 states that the educational institution shall state the policy in writing and make a copy of it available on request to the student.

One of the responsibilities of our Office is to provide technical assistance to agencies and institutions in complying with the law. We have a model policy available to assist institutions in formulating a student records policy.

IX. RIGHT TO FILE A COMPLAINT -- LIABILITY AND ENFORCEMENT

The last right afforded students by FERPA is the right to file a complaint with the U.S. Department of Education. The provisions relating to this right are included in Subpart E of the FERPA regulations. Subpart E sets forth the enforcement procedures.

The Secretary, in section 99.60 of Subpart E, designates the Family Policy Compliance Office (formerly the Family Policy and Regulations Office) to investigate, process, and review complaints and violations under the Act and the regulations, and to provide technical assistance to ensure compliance with the Act and the regulations. It is the institution's responsibility to implement practices to comply with FERPA. The Family Policy Compliance Office, as the delegate of the Secretary, and under the authority of section 99.60 of the regulations, investigates complaints of alleged violations according to the procedures outlined in section 99.65. The Department only has authority to take action against the institution and not against an individual who may have disclosed information. If a determination is made that a school is in violation, the institution and the complainant are so advised and the institution is informed of the measures to be taken to come into compliance with the law. The investigation remains open until voluntary compliance is achieved.

Concerning civil liability, the statute does not create a private cause of action under FERPA, as recognized in 1977 by the U.S. court of Appeals for the Eighth Circuit. (Girardier v. Webster College, 563 F.2d 1276, 1277 (1977)). Most district courts have followed that decision. The U.S. Court of Appeals for the Second Circuit did suggest in one ruling that a policy of denying access to education records which conflicts with the goals of FERPA might give rise to a claim (based on title 42 of the United States Code, Section 1983, Fay v. South Colonie Central School District, 802 F.2D 21, 33 (1986)), but this suggestion applied to the opportunity to inspect records, not to disclosures.

I'll end today's presentation by responding briefly to a few questions concerning some cross-cutting issues.

X. CROSS-CUTTING ISSUES

A. *COURT CASES*

A participant asked whether there has been any litigation for release of records without written permission. I am not aware of any recent significant court rulings on that issue. However the Family Policy Compliance Office does not interpret State court rulings related to FERPA.

As many of you are probably aware, the U.S. District Court for the Western District of Missouri has issued a decision in the case of Bauer v. Kincaid, et al. This case concerned, in part, the law enforcement exemption to the definition of education records. The U.S. Department of Justice, on behalf of the U.S. Department of Education, has filed a motion to intervene in the case. Beyond that, it would not be appropriate for me to comment further while this matter is before the court. In the meantime, the Department recommends that institutions continue to apply the provisions of FERPA in accordance with past guidance.

B. DISCLOSURE TO LAW ENFORCEMENT OFFICIALS, THE FBI, AND ARMY RECRUITERS

Our Office often receives inquiries about the provisions of FERPA that pertain to disclosures to law enforcement officials, the FBI, and Army recruiters. FERPA does not preclude the disclosure of properly designated directory information to any party -- including law enforcement officials, the FBI, and Army recruiters -- provided, of course, that the student has not exercised the right to refuse to allow the institution to disclose the information without consent under section 99.37.

No other information could be disclosed to Army recruiters without the student's prior written consent. No other information could generally be disclosed to the FBI or law enforcement officials without the student's prior written consent -- unless the disclosure would fall within one of the 12 exceptions to the prior written consent requirement discussed earlier; for example, the disclosure might fall within the exception which allows disclosure to comply with a lawfully issued subpoena (section 99.31(a)(9)) or the exception which allows disclosure to enforce the terms and conditions of student financial aid (section 99.31(a)(4)).

Information from the records of a campus law enforcement unit that meet the conditions of the exemption from the section 99.3 definition of "education records" could be disclosed to law enforcement officials of the same jurisdiction. A disclosure to any other party would subject the records to the protections of FERPA.

I should mention that for the purpose of FERPA, an IRS summons should be read as a "lawfully issued subpoena" under section 99.31(a)(9) of the regulations. Therefore, information from a student's education records may be disclosed without the student's consent in response to an IRS summons provided the school makes a reasonable attempt to notify the student in advance as required by section 99.31(a)(9).

C. GENERAL DISCUSSION OF TYPES OF COMPLAINTS

The complaints received by the Office from students of postsecondary institutions are relatively few in comparison with the number of students that are covered by the Act. However, the complaints are often complex and require a significant expenditure of time and effort to resolve. The types of complaints lodged by students are not concentrated in terms of any of the three basic rights afforded by FERPA: the right to have access to the education records, the right to seek to have them amended, and the right to have some control over the disclosure of information from the records.

The complexity of the complaints is due to several factors, including: the many nuances of FERPA itself; the fact that implementation of the FERPA provisions varies to some extent from institution to institution depending on the institution's own administrative organization and procedures; the fact that the complaints often involve overlapping issues relating, in . particular, to FERPA's access and amendment rights; and the fact that students are often engaged in contesting substantive decisions or actions -- such as contesting a grade -- and are pursuing access to or amendment of records toward that end.

As I discussed earlier, FERPA does not afford a student the right to seek to have a grade changed; however, it does afford a student the right to seek to have an inaccurate recording of a grade changed. A student who is seeking a grade change under an institution's grade appeal procedures may at the same time be pursuing the FERPA rights (1) to inspect and review records .related to and being generated as a result of the grade appeal, and (2) to challenge the accuracy of records on which the grade was based. Thus, the issues often become intertwined.

Complaints concerning the student's right to have some control over the disclosure of information from education records are sometimes, but not often, also intertwined in complaints relating to access and amendment rights. Many of the complaints relating to an unauthorized disclosure of information concern disclosures either to faculty members or other employees of the institution. Complaints of improper disclosures to officials, faculty members, or employees of the institution are generally found. either to be invalid or to be only technically violative in that the institution's student records policy does not contain the necessary criteria to establish that the individual had a legitimate educational interest.

XI. SUMMARY AND CLOSING STATEMENT

In my presentation today, I've endeavored to explain the scope and limitations of FERPA in general and to cover your specific questions as well. To briefly summarize some of the main points, FERPA affords students certain rights with respect to the student's education records. The student has the right to inspect and review all records that are directly related to the student and maintained by an educational institution, with certain very limited specific exceptions. The student is not generally entitled by FERPA to obtain copies of the records.

The student has the right to seek to have an inaccurate record amended. FERPA does not, however, afford the student the right to seek to have institutional decisions or Assessments, such as grades, changed.

FERPA affords the student the right to have some control over the disclosure of information from the student's education records. An educational institution must generally obtain the student's prior written consent before disclosing information from the records. of the 12 exceptions to the consent requirement, the ones that appear to be of primary concern to you are the exception that allows disclosure to the parents of a dependent student, the exception that allows disclosure of., properly designated directory information, and the exception that allows disclosure to comply with a lawfully issued subpoena or judicial order. I believe I have addressed your concerns about those exceptions.

It is also apparent that you are concerned about the FERPA implications of allowing students to access their records electronically, of disclosing information via telefax and telephone and in response to a telefaxed consent, and of the use of computerized records in general. The guidance I have offered on these issues is intended to make certain that you are aware that it is the institution's responsibility to ensure that information is not improperly disclosed and that FERPA does not impose specific procedures that institutions must follow in regard to the issues you have raised.

The Family Policy Compliance office investigates complaints that are filed with the office to determine whether the institution has failed to comply with the provisions of the law or the regulations and, if so, informs the institution of any steps that are necessary in order to comply. If, as a result of an investigation, the Office determines that an institution's procedures need to be changed in order to comply, the institution is so informed. The Department is authorized to take other actions, but action to terminate funding will be taken only if compliance cannot be secured by voluntary means. As a practical matter, voluntary compliance has always been secured, and other action has therefore not been necessary.

Thank you for inviting me to speak today. I have endeavored to give an overview of FERPA, to address the scope and limitations of the law, and to address your specific concerns and questions as well. And, finally, thank you for your interest in ensuring that your institution is in compliance with the law.

F. SAMPLE POLICIES AND FORMS

1. California State University, San Bernardino -- *Administrative Systems Security Policy*
2. Central Michigan University -- *Authorization to Release Information*
3. Rutgers University -- *Directory Information Exclusion Form*
4. North Dakota State University -- *FERPA Release*
5. University of Colorado at Boulder -- *Guidelines for the Release of Student Information under the Family Educational Rights and Privacy Act of 1974*
6. University of Tulsa -- *Letter to parents re: Release of Student Personal Information* and *Student Request to Share Information Form*
7. Department of Education, Family Policy Compliance Office -- *Model Notification of Rights under FERPA for Postsecondary Institutions*
8. Harvard School of Public Health -- *Restriction of Directory Information Form*
9. North Dakota State University -- *Student-Athlete Consent to Disclosure of Education Records*
10. National Collegiate Athletic Association -- *Student-Athlete Release*
11. North Dakota State University -- *Student Reference Request and FERPA Release*

CALIFORNIA STATE UNIVERSITY, SAN BERNARDINO

CSUSB Administrative Systems Security Policy

[F.E.R.P.A.] [Return to Access Request Form]

All employees of the California State University, San Bernardino (administrative, academic, staff and student workers) are required to abide by the policies governing review and release of student education records. The Family Educational Rights and Privacy Act (FERPA) of 1974 mandates that information contained in a student's education record must be kept confidential and outlines the procedures for review, release and access of such information.

Access to CSUSB Administrative Systems will be granted to those individuals who have been determined to have a legitimate operational need for the data. Applicants must complete the Administrative Systems Access Request Form (Access Request Form) and obtain approval of their area supervisor, department chair, or school dean. The form, will then be sent via e-mail to Administrative Computing, Data Center Services, attention Data Administration. You will receive confirmation back via e-mail within 24 hours that your request has been received. The data administrator will then obtain authorization from the appropriate application security representative(s) and assign the appropriate access level. Within 48 hours of your initial request you will be contacted by the Data Administrator with your User Identification Number, System Access Code and default passwords. Individuals who have been granted access to any Administrative System must understand and accept the responsibility of working with confidential data and student records. The following rules apply to all University employees:

1. Every employee given access to the system will be assigned an operator identification number and password. User ID's and passwords must not be shared or given to anyone, including supervisors, co-workers, student employees, or friends.

2. In all transactions, employees shall use their own account numbers. When authority is needed to access additional screens or systems, staff and faculty should make a request through their departmental supervisor. After the request has been approved, the requests should be forwarded to Administrative Computing, as above. Each person given an operator number is held responsible for all transactions which occurs using that operator number. All transactions on the system are logged by operator identification number for auditing purposes.

3. It is the responsibility of each employee to keep his/her password confidential and to change passwords whenever they feel it is necessary.

A brief policy statement is found in the Appendix of the Bulletin and a complete policy statement on the FERPA can be found in the Office of the Vice President, Student Services. In part, the policy states that officials and employees of the University may be given access to student education records on a "need-to-know" basis and that such access must be limited to job-related, legitimate educational interests. The information contained in a student's education record may not be released to a third party without the written consent of the student or without meeting FERPA criteria. Unless restricted by the student, the only exception would be "directory" information defined as the student's name, local and home address and telephone numbers, date and place of birth, major field of study, participation in officially-recognized activities and sports, dates of attendance, degrees and awards received, and the most recent previous educational institution attended. All other information about a student kept by the University is considered "non-directory" and is not to be used or released without meeting FERPA criteria. Inappropriate use or misuse of student records is a violation of federal law under FERPA and could result in criminal and/or civil prosecution.

Examples of inappropriate use of student records are:

1. Accessing or reviewing a student's record without a legitimate educational interest.

2. Releasing confidential student information (non-directory) to another student, University organization, any employee who does not have a legitimate educational interest, persons not employee by the University, or parents of a student, without the student's written authorization.

3. Leaving reports or computer screens containing confidential student information in view of others who do not have a legitimate educational interest in the data.

4. Using the student information for personal business or gain, whether for profit or non-profit organizations.

5. Giving your password to another individual not authorized to view the screen.

6. Discussing the information contained in the student record outside of the University or while on the job with individuals who do not have a legitimate educational interest in the information (need-to-know).

7. Leaving data displayed on the screen and your computer terminal unattended while "logged on" to SIS+ which is likely to result in unauthorized use.

Under no circumstances should an employee give student records information about students to any other students, to other employees, or to any person who has not been authorized to receive such information by their position or by their departmental supervisor. Although directory information may be released without prior consent, any requests coming from students or from anyone off campus should be referred to the Office of Admissions and Records or to the Office of the Vice President, Student Services.

**Students may request that directory information concerning them not be released. If that occurs, a flag denoting such a request will appear on Screen 7. No information may then be released without the student's express written consent.

CENTRAL MICHIGAN
UNIVERSITY

Return form to:
Receivable Accounting
Central Michigan University
Warriner Hall 103
Mt. Pleasant, MI 48859

AUTHORIZATION TO RELEASE INFORMATION

The purpose of the Educational Rights and Privacy Act of 1974 is to protect the privacy of information concerning individual students by placing certain restrictions on the disclosure of information contained in a student's university records. I understand that in order for the Receivable Accounting Office to honor a verbal or written request for information by anyone other then the individual student, a signed and notarized authorization must be on file.

Therefore, I ______________________________ (PLEASE PRINT CLEARLY), SS# ________________________, authorize the

Central Michigan University Receivable Accounting Office to release information to:

______________________________ (NAME), ______________________________ (RELATIONSHIP TO STUDENT).

PLEASE INCUDE BOTH MOTHER AND FATHER'S FIRST NAMES

I understand that this pertains to information regarding ALL of the following: ACCOUNTS RECEIVABLE (itemized charges and credits); FINANCIAL AID (itemized charges, credits, and refunds); HEALTH SERVICES (summarized charges and insurance credits); HOUSING (charges, credits, and itemized damage charges); REGISTRATION (number of credit hours, hours added, and hours dropped); TELEPHONE (summarized charges and credits-- Telecommunications Office can be contacted for detailed information).

I would / would not (please circle one) like my Receivable Accounting statements to be sent to my home address:

STREET ____

CITY ______________________________ STATE __________ ZIP CODE ____________

TELEPHONE (   ) ____________________________

I understand that this mail request applies ONLY to my monthly receivable accounting statements and tuition and fee bills. I also understand that it is my responsibility to modify this form if the above address should change.

The above information will be released with my FULL CONSENT. I understand that this authorization remains in effect from today through ______________ **(Month / Year)**. It will be necessary to send a written letter to revoke this authorization prior to the expiration date I have indicated.

Signature ____ Date ________________

STATE OF MICHIGAN)
COUNTY OF) SS:

Subscribed and sworn to before me ______________________________ this
NOTARY PUBLIC

__________ day of ______________________________, 19__________.

MOUNT PLEASANT, MICHIGAN 48859

The State University of New Jersey

RUTGERS

Directory Information Exclusion Form

Important Information Regarding the Distribution of Your Student Directory Information

The confidentiality of students' educational records is protected by the Family Educational Rights and Privacy Act (FERPA), a federal law. However, FERPA allows the University to release student "directory information" without a student's consent unless the student has requested such information be kept confidential. Rutgers defines "directory information" as the following: name, campus address, campus post office address, campus telephone number, Rutgers e-mail address, permanent address and telephone number, school of attendance, major field of study, class year, dates of attendance, current credit load, credit hours earned, degree(s) received, and dates of degree(s).

The two most common ways in which Rutgers releases student directory information are:

1. Through the Verifications Division of the Office of the Registrar or similar offices that have access to student records. The Verification Division is called upon to verify that a student is enrolled at the University by potential employers, credit agencies, and others. Directory information as defined above may be made available through other offices with access to student records upon similar request.
2. Through the "Finding People" database available through the principal Rutgers website (http://www.rutgers.edu) and accessible worldwide via Internet. This data base does not list campus residence address, but does list many of the other categories of directory information.

Rutgers offers students the option to keep directory information confidential. However, please be advised that doing so will make this important information unavailable to all, including prospective employers, credit agencies, and others to whom you may want this

information known, or verified. Thus it is recommended that students carefully consider whether personal privacy concerns outweigh the potential inconvenience of having directory information withheld. Submitting this form will make your directory information confidential until you request in writing to the Registrar's Office that this restriction be lifted. As with all confidential student records, Rutgers University will release information to specific individuals or entities only with the express written consent of the student or as otherwise required by law.

For questions about compliance with FERPA, call the Director of Compliance and Student Policy Concerns at (732) 932-7312, Extension 11.

To continue to allow the release of your directory information, do nothing. If you wish Rutgers to keep your directory information confidential, **please print out this page** and circle the **YES** below, print your name, provide your 9-digit student identification number (Social Security number), sign and date this form, and return it to:

Office of the Registrar
Rutgers, The State University of NJ
Armitage Hall, Room 143
311 North 5th Street
Camden, New Jersey 08102-1499
ATTN: VERIFICATIONS

I want Rutgers to keep my directory information confidential: **YES** / NO

Name (Please Print):

Student Identification Number (9-digit):

Signature:

Date:

Rev . 9/98

FERPA RELEASE

North Dakota State University
Fargo, North Dakota 58105

Name of Student ______________________ NAID: ______________

DOB: ______________

I, the undersigned, hereby authorize NDSU to release the following educational records and

information (identify records or types of records) ______________________

____

to ______________________
(Name and Address of Person/Agency to Receive Information)

for the purpose of ______________________

____

____

I understand further that (1) I have the right not to consent to the release of my education records; (2) I have the right to receive a copy of such records upon request; (3) and that this consent shall remain in effect until revoked by me, in writing, and delivered to NDSU, but that any such revocation shall not affect disclosures previously made by NDSU prior to the receipt of any such written revocation.

______________________ ______________
Student's Signature Date

____
Signature of Parent or Guardian
if student is under 18

THIS INFORMATION IS RELEASED SUBJECT TO THE CONFIDENTIALITY PROVISIONS OF APPROPRIATE STATE AND FEDERAL LAWS AND REGULATIONS WHICH PROHIBIT ANY FURTHER DISCLOSURE OF THIS INFORMATION WITHOUT THE SPECIFIC WRITTEN CONSENT OF THE PERSON TO WHOM IT PERTAINS, OR AS OTHERWISE PERMITTED BY SUCH REGULATIONS.

Colorado

University of Colorado at Boulder

Guidelines for the Release of Student Information Under the Family Educational Rights and Privacy Act of 1974 (FERPA)

Purpose of FERPA

FERPA deals specifically with the education records of students, affording them certain rights with respect to those records. For purposes of definition, education records are those records which are:

- directly related to a student and
- maintained by an institution or a party acting for the institution.

FERPA gives students who reach the age of 18 or who attend a postsecondary institution the right to inspect and review their own education records. Furthermore, students have other rights, including the right to request amendment of records and to have some control over the disclosure of personally identifiable information from these records.

FERPA applies to the education records of persons who are or have been in attendance in postsecondary institutions, including students in cooperative and correspondence study programs. FERPA does not apply to records of applicants for admission who are denied acceptance or, if accepted, do not attend an institution. Furthermore, rights are not given by FERPA to students enrolled in one component of an institution who seek to be admitted in another component of an institution.

Students' Rights Under FERPA

- Students and former students have rights to inspect and review their education records.
- Students must be able to inspect and review their education records within a maximum of 45 days after they request to do so. The right of inspection and review includes:
    - the right to an explanation and interpretation of the record.
    - the right to a copy of the education records when failure to provide

a copy of the record would effectively prevent the student from inspecting and reviewing the record.

- Some limitations exist on students' right to inspect and review their education records, including:
  - financial information submitted by parents
  - confidential letters and recommendations placed in their files prior to January 1, 1975.
  - confidential letters and recommendations placed in their files after January 1, 1975, to which the student has waived his or her right to inspect and review and that are related to the students' admission, application for employment or job placement, or receipt of honors.
  - education records containing information about more than one student.

Definition of Education Records

Those records directly related to a student and maintained by the institution or by a party acting for the institution are considered education records. The term "education records" does not include the following:

- records of instructional, supervisory, administrative, and certain educational personnel which are in the sole possession of the maker thereof, and are not accessible or revealed to any other individual except a substitute who performs on a temporary basis (as defined in the institutional personnel policy) the duties of the individual who made the records.
- records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.
- records relating to individuals who are employed by the institution, which are made and maintained in the normal course of business, relate exclusively to individuals in their capacity as employees, and are not available for use for any other purpose.
- records relating to a student which are
  - created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional, acting in his/her professional capacity or assisting in a paraprofessional capacity or assisting in a paraprofessional capacity;
  - used solely in connection with the provision of treatment to the student; and
  - not disclosed to anyone other than individuals providing such treatment.

Definition of Legitimate Educational Interest

It means the demonstrated need to know by those officials of an institution who act in the student's educational interest, including faculty, administration, clerical and professional employees, and other persons who manage student records information. Any school official who needs information about a student in the course of performing instructional, supervisory, advisory, or administrative duties for the University of Colorado, Boulder has a legitimate educational interest.

FERPA Exemptions to Privacy: Directory Information

Provisions of FERPA allow the institution to define directory information, that is, information which is public. The University of Colorado, Boulder, determined that the following student information is directory information:

name, mailing and permanent addresses and telephone numbers, e-mail address, student photo, dates of attendance, registration status, class, major field of study, awards, honors, degree(s) conferred, past and present participation in officially recognized sports and activities, physical characteristics (height/weight) of athletes, prior schools attended, and date and place of birth.

Students May Request Nondisclosure of Directory Information

Enrolled students may withhold disclosure of directory information under FERPA via two methods. The first is called adding privacy restriction to their records. Upon designating this status on their academic records, no information can be released to the general public, including phone requests from financial lenders, employers or insurance companies for verification of terms of enrollment, verification of their presence on campus, nor any address or telephone information. The other designation, called limited-privacy, will allow individual callers to obtain telephone numbers and addresses and to obtain enrollment verification, but prevents other forms of release of student data, as shown below. In both cases, these privacy designations will prevent the release of directory information to:

- Campus Web Directory (411)
- Campus Directory Assistance (2-1411)
- Residence hall or family housing directory assistance (6-1411)
- Off-campus requesters who desire lists or labels of enrolled student names and addresses.
- Student e-memos deemed to be "general" in content. E-memos determined to be "vital" in content will continue to be sent.

NOTE: Under the Solomon Amendment of 1997, military recruiters are guaranteed access to directory information for all students except those with privacy designated on their records.

For anyone calling for a student who has a privacy notation noted on the record, the following statement should be spoken:

"In accordance with the rights granted to all students by the FERPA, this individual has requested that release of their educational records be withheld. Therefore, I cannot release any information for you relative to this individual."

Exceptions to Student Consent for Release of Educational Records

- FERPA allows the institution the right to disclose student records or identifiable information without the student's consent under the following circumstances:
- to authorized representatives for audit of Federal or State supported programs.
- to University employees who are in the process of carrying out their specifically assigned educational or administrative responsibilities acting in the student's educational interest.
- Veteran's Administration officials
- officials of other institutions in which a student seeks or intends to enroll on the condition that the issuing institution makes a reasonable attempt to inform the student of the disclosure unless the student initiates the transfer.
- persons or organizations providing financial aid to students.
- organizations conducting studies for, or on behalf of, educational agencies or institutions to develop, validate, and administer predictive tests, to administer student aid programs or to improve instruction, provided that individual identity of students is not made.
- accrediting organizations carrying out their accrediting functions.
- parents of a student who have established that student's status as a dependent according to Internal Revenue Code of 1954, Section 152.
- persons in compliance with a judicial order or a lawfully issued subpoena, provided that the institution makes a reasonable attempt to notify the student in advance of compliance. NOTE: The institution is not required to notify the student if a federal grand jury subpoena, or any other subpoena issued for a law enforcement purpose, orders the institution not to disclose the existence or contents of the subpoena.
- persons in an emergency, if the knowledge of information, in fact, is necessary to protect the health or safety of students or other persons.
- an alleged victim of any crime of violence of the results of any institutional disciplinary proceeding against the alleged perpetrator. The information may only be given in respect to the crime committed.
- schools may disclose personally identifiable information from education records to an outside contractor without prior written student consent if the outside contractor is a "party acting for" the institution and is performing a service which the institution would otherwise have to perform for itself (as in the case of the National Student Loan Clearinghouse for loan verification).

Challenge of the Contents of Education Records

Institutions must provide students with an opportunity to challenge and amend the contents of their education records which the students consider to be inaccurate, misleading, or otherwise in violation of their privacy or other rights. Officials who receive challenge requests must decide within a reasonable period of time whether corrective action consistent with the student's request will be taken. The student must be notified of the decision. If the decision is in agreement with the student's request, the appropriate record(s) must be amended. A student who is not provided full relief sought by his/her challenge must be informed by the appropriate official, in writing, of the decision and his/her right to a formal hearing on the matter.

Parental Access to Children's Education Records

At the postsecondary level, parents have no inherent rights to inspect a student's education records. The right to inspect is limited solely to the student. Records may be released to the parents only under the following circumstances:

- through the written consent of the student,
- in compliance with a subpoena,
- by submission of evidence that the parents declare the student as a dependent on their most recent Federal Income Tax form (IRS Code of 1954, Section 152).

In cases of divorce, separation or custody, when only one parent declares the student as dependent, an institution may grant equal access to information from the student's education records. However, when access is given to one parent, the institution must grant equal access to the other parent upon request, unless there is a court order, state statute, or legally binding document stating otherwise.

Posting of Grades by Faculty

The public posting of grades either by the student's name, institutional student identification number, or social security number without the student's written permission is a violation of FERPA, whether done via paper source or via electronic means (including the World Wide Web). Instructors and others who post grades should use a system that ensures FERPA requirements are met. This can be done by using code words or randomly assigned numbers that only the instructor and individual students know.

Students' Rights After Ceasing Attendance or Graduating

Students who have ceased attendance or have graduated from an institution of higher education have basically the same FERPA rights as students currently attending the University of Colorado, Boulder, including the right to:

- inspect their education records
- have a hearing to amend an education record, and
- have their education privacy protected by the institution. Once a student leaves the University they do not have the right to request privacy.

References for Students by Faculty

FERPA's prohibition on disclosure of personally identifiable information from an education record of a student applies to any kind of nondirectory information (e.g., performance in class, grades, attitude, motivation, abilities, background) conveyed in writing, in person, or over the telephone to third parties.

Although such information is usually conveyed by faculty members at the informal request of the student and is usually positive, the better practice would be to request a written consent form, meeting the FERPA requirements, before providing the information.

Disposal of Student Educational Records

Information about individuals should be retained only so long as it is valid and useful. Those responsible for academic information have an obligation to destroy information when conditions under which it was collected no longer prevail. Any document containing personally identifiable information must be disposed of properly through some means of confidential disposal. If you need information on confidential disposal, you can call Academic Records at 303-492-6907.

These are interpretive guidelines only. For further detail or specific questions, please call Academic Records at 303-492-6907.

The University of Tulsa
Division of Student Development

Release of Student Personal Information
University of Tulsa

Dear Parents/Guardians/Spouses:

The members of the University of Tulsa community are preparing for the opening of the 1998-99 academic year. We are all eager to have our students back on campus, studying hard and pursuing extra- and co-curricular activities.

Families are important to the success of students through their support and encouragement. I am writing to urge you to discuss with the TU student in your family an issue of importance regarding the University's ability to share information about students with their families or others with a special relationship to them.

A Federal law, The Family Educational Rights and Privacy Act of 1974 as amended (FERPA), requires that we at The University of Tulsa protect the privacy of students' educational records. We believe an informed decision in this matter requires accurate information and open discussion between you and the TU student in your family.

Please read the summary carefully and discuss its contents with the TU student in your family to reach agreement about what information the University is allowed to release, and to whom. Please do not hesitate to call me at (918) 631-2327 for clarification or additional information.

Sincerely,

Yolanda Taylor
Dean of Students

The University of Tulsa & FERPA
(Notice Mailed to Parents)

The Family Educational Rights and Privacy Act of 1974 (FERPA) as amended is a federal law which is designed to protect the privacy of and limit access to the educational records of students. This means that institutions generally must withhold such information from parents and others who believe their relationship with the student entitles them to have the information, sometimes even on occasions when the student prefers the information be released. As a result, we sometimes encounter frustrated parents, guardians, or spouses who question why they cannot have information about a student's grades, financial obligations, or standing with the University.

Education records generally covered by federal privacy laws include grades, housing information, medical treatment (including hospitalization), enrollment and attendance information, financial status, results of disciplinary proceedings, etc.

Please understand that if we have not been given permission by the student to release information to someone, we generally CANNOT release the information under the provisions of FERPA. We are able to release information IF we have proof of the student's status as a dependent under the Internal Revenue Service Code for the period covered. However, tax returns on file with the University cover the preceding year, often the proof is out of date and may no longer be applicable.

I have sent a "Student Request to Share Information" form to your student. When the form is initialed, signed, and returned to me, we will be able to disclose information and respond to inquiries from the designated individuals. The signed release forms will be kept on file in the Dean of Students Office. Students may revise the form's designations at any time during the year. The form is kept on file for the current academic year. **Each academic year students must file a new FERPA form.**

Please discuss this important issue before a situation arises when your release of information must be determined by law rather than the wishes of the student. Thank you for helping us respond appropriately to students' wishes as we meet our legal obligations.

The University of Tulsa & FERPA
(Notice Mailed to Students)

The Family Educational Rights and Privacy Act of 1974 (FERPA) as amended is a federal law which is designed to protect the privacy of and limit access to the educational records of students. This means that institutions generally must withhold such information from parents and others who believe their relationship with the student entitles them to have the information, sometimes even on occasions when the student prefers the information be released. As a result, we sometimes encounter frustrated parents, guardians, or spouses who question why they cannot have information about a student's grades, financial obligations, or standing with the University.

Education records generally covered by federal privacy laws include grades, housing information, medical treatment (including hospitalization), enrollment and attendance information, financial status, results of disciplinary proceedings, etc.

Please understand that if we have not been given permission by the student to release information to someone, we generally CANNOT release the information under the provisions of FERPA. We are able to release information IF we have proof of the student's status as a dependent under the Internal Revenue Service Code for the period covered. However, tax returns on file with the University cover the preceding year, often the proof is out of date and may no longer be applicable.

I have enclosed a "Student Request to Share Information" form. When the form is initialed, signed, and returned to me, we will be able to disclose information and respond to inquiries from the designated individuals. The signed release forms will be kept on file in the Dean of Students Office. Students may revise the form's designations at any time during the year. The form is kept on file for the current academic year. **Each academic year students must file a new FERPA form.**

Please discuss this important issue before a situation arises when your release of information must be determined by law rather than the wishes of the student. Thank you for helping us respond appropriately to students' wishes as we meet our legal obligations.

University of Tulsa

Student Request to Share Information

1998-1999 Academic Year

Student's Name: ______________________________

TU ID# or SSN: ______________________________

I was claimed as a dependent on my parent's most recent tax return.

Yes: _____ No: _____

I know that the Family Educational Rights and Privacy Act of 1974 as amended (FERPA) protects the privacy of my student education records and limits access to the information contained in those records.

I have indicated below the individual(s) who may have information from my educational records:

(1) Name: ______________________________

Relationship to Student: ______________________________

Address: ______________________________

____

Telephone: ______________________________

PLEASE BE CERTAIN TO INITIAL ALL THAT APPLY

1) If they ask, I want the above named individual(s) to be informed about (initial all that apply):

_____ My grades and academic standing

_____ My enrollment and attendance records

_____ My financial standing with the University

_____ Results of disciplinary proceedings of which I was a party

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_____ 2) Please inform the above named individual(s) if the University becomes aware of my being hospitalized or treated for any emergency of life-threatening medical or psychological condition.

_____ 3) Please inform the above named individual(s) if someone at the University becomes concerned about me (missing classes, disruptive or erratic behavior, etc.). Usually, the Dean of Students or the Vice President for Enrollment and Student Services will contact the above named individual(s).

_____ 4) I have listed below other information the above named individual(s) may obtain.

_____ 5) Please have the Dean of Students or the Vice President of Enrollment and Student Services inform the above individual(s) if either of them believes it is in my best interest to do so. I understand that circumstances may make it necessary for some other University officail to act on their own behalf.

_____________________ ______________________________________

Date Student's Signature

____

Print Name

Return to: Yoland D. Taylor
Associate Vice President of Enrollment
And Student Services and Dean of Students
University of Tulsa
600 South College Avenue
Tulsa, OK 74104-3189

Effective August 24, 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

Model Notification of Rights under FERPA*

The Family Educational Rights and Privacy Act (FERPA) affords students certain rights with respect to their education records. They are:

(1) The right to inspect and review the student's education records.

(2) The right to request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

(4) The right to file with the U.S. Department of Education a complaint concerning alleged failures by State University to comply with the requirements of FERPA.

(5) The right to obtain a copy of the State University's student records policy. You can obtain a copy of the policy from the Registrar's office.

* Section 99.7 of FERPA requires that school annually notify students currently in attendance of their rights under FERPA and inform them of the location where the policy can be obtained. The notification may be given by any means reasonably likely to inform students of their rights such as publication in a newsletter or in a student handbook.

A school may wish to include in its annual notification of rights its notice regarding its intent to designate certain information as directory information in accordance with 34 CFR § 99.37. Section 99.3 of the FERPA regulations provides a list of the types of information that can be designated as directory information. That list is all-inclusive. A school could also designate photograph and class schedule, for example, as directory information. However, personal identifiers such as social security numbers and student identification numbers cannot be designated as directory information. If you have any questions with regard to designating certain information as directory information under §99.3 or the notice of such designation under § 99.37, please call the Family Policy Compliance Office for technical assistance. Our telephone number is (202) 260-3887.

RESTRICTION CODE FORM
Harvard School of Public Health
Registrar's Office

The School of Public Health has designated certain types of personally identifiable information as "Directory Information." This includes your name, photograph, department and degree program, dates of attendance, full- or part-time status, degree and awards received, previous schools attended and degrees received, local and permanent address, telephone number, email address, date of birth, and country of origin. This data will not be released by the School of Public Health except as authorized by law. You have the opportunity, below, to restrict the release of your Directory Information. The Restriction Code you choose will carry over from year to year unless you submit a new Restriction Code Form to the Registrar's Office.

- **Restricting your Directory Information will result in the Registrar's Office refusing to release your information over the telephone to friends, family and colleagues.**
- **If you restrict this information your address, telephone number, and email address will not appear in the Harvard University Student Telephone Directory.**
- **If you also choose to restrict your name and image, you will not appear in the Photo Directory or any other school publications, including Commencement publications.**

Please check the appropriate box:

☐ I do not wish to restrict the release of my Directory Information.

☐ I wish to restrict the release of my Directory Information, **excluding** my name and image.

☐ I wish to restrict the release of my Directory Information, **including** my name and image (I do not wish to appear in the Photo Directory or any other HSPH or Harvard publications).

My signature below indicates that I have read and understand my rights as outlined here.

Signature ______________________ Date ______________

Printed Name ______________________ Harvard ID Number ______________

NORTH DAKOTA STATE UNIVERSITY

STUDENT-ATHLETE CONSENT TO DISCLOSURE OF EDUCATION RECORDS

The undersigned student-athlete hereby consents to the disclosure of the following education records related to me to the persons and for the purposes as stated below:

1. Semester and cumulative grade point average. The purpose of this disclosure is to provide informaton for student athlete of the week, featured news stories, feature stories, and other University, Alumni, or Team Maker publications, and for all Academic All Conference or All America or other conference or national awards. The disclosure shall be made to the electronic and print media.

2. Athletic history and informaton disclosed on the NDSU Athlete Questionnaire. The purpose of this disclosure is to provide general background and family information on you and about your athletic history. The disclosure is to the electronic and print media.

3. Academic records and disciplinary conduct records. The purpose of this disclosure is to enable Athletic Department personnel to discuss our academic performance any disciplinary conduct matters that may arise. The disclosure will be to your parents or guardians, to your instructors, NDSU coaches and Athletic Department administrators.

I understand further: (1) that such records may be disclosed only on the condition that the party to whom the information is disclosed will not redisclose the information to any other party without my written consent unless specifically allowed by laws; (2) that disclosure to the news media means tht such informaton may be publicly disclosed by the news media; (3) that I have the right not to consent to this release of my educaiton records; (4) that I recognize that a copy of such records must be provided to me upon my request; and (5) that his consent remains in effect unless revoked by me in writing.

Date	Signature of Student-Athlete
Date	Signature of Parent of Guardian if Student Athlete is Under 18 years of age

Form 98-3B

Academic Year 1998-99

Student-Athlete Statement -- Division II

For:	Student-athletes
Action:	Sign and return to your director of athletics
Due date:	Before you first compete each year
Required by:	NCAA Constitution 3.2.4.5 and Bylaws 14.1.3.1 and 30.12
Purpose:	To assist in certifying eligibility

TO STUDENT-ATHLETE

Name of your institution: ____________________

This form has three parts: a statement concerning eligibility, a Buckley Amendment consent and an affirmation of a valid ACT or SAT score. You must sign all three parts to participate in intercollegiate competition.

Before you sign this form, you should read the Summary of NCAA Regulations provided by your director of athletics or read the bylaws of the NCAA Division II Manual that deal with your eligibility. If you have any questions, you should discuss them with your director of athletics.

The conditions that you must meet to be eligible and the requirement that you sign this form are spelled out in the following articles and bylaws of the NCAA Division II manual.

- **Articles 10, 12, 13, 14, 15 and 16**
- **Bylaws 14.1.3.1, 18.4 and 31.2.3**

Part I: Statement Concerning Eligibility

By signing this part of the form, you affirm that, to the best of your knowledge, you are eligible to compete in intercollegiate competition.

You affirm that you have read the Summary of NCAA Regulations or the relevant sections of the NCAA Division II Manual, and that your director of athletics (or his or her designee) gave you the opportunity to ask questions about them.

You affirm that you meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, amateur status and involvement in organized gambling.

You affirm that you are aware of the NCAA drug-testing program and that you have signed the 1998-99 Drug-Testing Consent (Form 98-3e).

You affirm that you have reported to the director of athletics of your institution any violations of NCAA regulations involving you and your institution.

You affirm that you understand that if you sign this statement falsely or erroneously, you violate NCAA legislation on ethical conduct and you will further jeopardize your eligibility.

____________________ Name (please print)

____________________ Date of Birth

____________________ Signature of Student-Athlete

____________________ Home Address

____________________ Date

____

____________________ Sport(s)

Part II: Buckley Amendment Consent

By signing this part of the form, you certify that you agree to disclose your education records.

You understand that this entire form and the results of any NCAA drug test you may take are part of your education records. These records are protected by the Family Educational Rights and Privacy Act of 1974, and they may not be disclosed without your consent.

You give your consent to disclose only to authorized representatives of this institution, its athletics conference (if any) and the NCAA, the following documents:

- This form;
- Results of NCAA drug tests;
- Of any transcript from your high school, this institution, or any junior college or any other four-year institutions you have attended;
- Precollege test scores, appropriately related information and correspondence (e.g., testing sites and dates, and letters of test-score certification or appeal), and where applicable, information relating to eligibility for or conduct of nonstandard testing;
- Records concerning your financial aid; and
- Of any other papers or information pertaining to your NCAA eligibility.

You agree to disclose these records only to determine your eligibility for intercollegiate athletics, your eligibility for athletically related financial aid, for purposes of inclusion in summary institutional information reported to the NCAA (and which may be publicly released by it), for NCAA longitudinal research studies and for activities related to NCAA compliance reviews.

Date

Signature of Student-Athlete

Part III: Incoming Freshmen -- Affirmation of valid ACT or SAT Score

You affirm that, to the best of your knowledge, you have received a validated ACT and/or SAT score. You agree that, in the event you are or have been notified by ACT or SAT of the possibility of an invalidated test score, you will immediately notify the director athletics at your institution.

Name

Date

Signature of Student-Athlete

Part IV: Results of Drug Tests

You affirm that you have not tested positive for banned substances by a non-NCAA athletics organization. Further, you understand that if you tested positive, you are subject to an NCAA drug test.

Name

Date

Signature of Student-Athlete

What to do with this form: Sign and return it to your director of athletics before you first compete. This form is to be kept in the director of athletics' office for six years.

NCAA, 6201 College Boulevard, Overland Park, Kansas 66211-2422 913/339-1906

NCAA 12774-6/98

NORTH DAKOTA STATE UNIVERSITY

STUDENT REFERENCE REQUEST AND FERPA RELEASE

Student Name *(please print)*: ______________________________

I request ______________________ to serve as a reference for me. The purpose(s) of the reference are *(check all applicable spaces)*:

________ application for employment

________ all forms of scholarship or honorary awards

________ admission to another education institution

The reference may be given in the following form(s):
(check one or both spaces)

________ written ________ oral

I authorize the above person to release information and provide an evaluation about any and all information from my education records at NDSU, including information pertaining to my education at other institutions I have previously attended which is part of my education records at NDSU, deemed necessary by said employee to provide the above reference. *(check all applicable spaces)*

1. ________ all prospective employers OR ________ specific employers *(list on reverse side)*

2. ________ all educational institutions to which I seek admission OR ________ specific educational institutions *(list on reverse side)*

3. ________ all organizations considering me for an award or scholarship OR ________ specific organizations *(list on reverse side)*

I understand further that (1) I have the right not to consent to the release of my education records; (2) I have a right to receive a copy of any written reference upon request; (3) and that this consent shall remain in effect until revoked by me, in writing, and delivered to the above employee, but that any such revocation shall not affect disclosures previously made by said employee prior to the employee's receipt of any such written revocation.

______________________________ ______________________
Student's Signature Date

G. ANNOTATED BIBLIOGRAPHY OF SELECTED ADDITIONAL MATERIALS PERTAINING TO FERPA

ANNOTATED BIBLIOGRAPHY OF SELECTED ADDITIONAL RESOURCES PERTAINING TO FERPA

A. Significant Cases Involving FERPA

1. No private right of action under FERPA

a. *Girardier v. Webster College*, 563 F.2d 1276 (8th Cir. 1977) ("The statute does not say that a private remedy is given. Enforcement is solely in the hands of the Secretary of Health, Education and Welfare . . . . Under such circumstances, no private cause of action arises by inference.")

b. *Fay v. South Colonie Central School District*, 802 F.2d 21 (2d Cir. 1986) ("FERPA itself does not give rise to a private cause of action.")

c. *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990) ("[A] private right of action does not exist under FERPA.")

d. *Krebs v. Rutgers*, 797 F. Supp. 1246 (D.N.J. 1992) ("[E]very court which has addressed the issue has concluded that FERPA does not provide a private cause of action".)

2. Enforcement action may be brought under § 1983

a. *Fay v. South Colonie Central School District*, 802 F.2d 21 (2d Cir. 1986) ("The district court correctly determined that FERPA creates an interest that may be vindicated in a section 1983 action because Congress did not create so comprehensive a system of enforcing the statute as to demonstrate an intention to preclude a remedy under section 1983.")

b. *Cullens v. Bemis*, 1992 U.S. App. LEXIS 35876 (6th Cir.) ("FERPA itself does not give rise to a private cause of action, but does create an interest that may be vindicated in a § 1983 action.")

c. *Krebs v. Rutgers*, 797 F. Supp. 1246 (D.N.J. 1992) ("[E]very court which has addressed the issue has concluded that FERPA does not provide a private cause of action. . . . However, those same courts have concluded that plaintiffs may assert section 1983 claims premised on FERPA violations. . . . The complete inadequacy of the Secretary's regulations, coupled with the statute's failure to require more complete relief for aggrieved individuals, confirms the absence of an implicit exhaustion requirement in FERPA.")

d. *Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40 (D.N.H. 1994) ("Because Congress has not provided an explicit exhaustion requirement in FERPA and the regulations do not provide a course of action such that if the plaintiff were to exhaust the administrative remedies, adequate relief would be obtained, the court finds that the plaintiff may proceed with this claim under § 1983.")

3. Enforcement action may *not* be brought under § 1983

   a. *Norris v. Board of Education*, 797 F. Supp. 1452 (S.D. Ind. 1992) ("The FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism.")

   b. *Abrams v. Mary Washington College*, 33 Va. Cir. 449 (1994) ("FERPA contains its own enforcement mechanisms and does not bestow upon individual students the right to pursue private actions for monetary damages under § 1983.")

   c. *Gundlach v. Reinstein*, 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd mem.*, 114 F.3d 1172 (3d Cir. 1997) ("[T]he requirement placed on the participating institution is not that it must prevent the unauthorized release of education records, as Mr. Gundlach contends, but that it cannot improperly release such records as a matter of policy or practice. . . . Thus, we glean no unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA.")

   d. *Achman v. Chisago Lakes Independent School District*, 1999 U.S. Dist. LEXIS 4874 (D. Minn.) ("Achman . . . claims that, in this one instance, the District released educational records without his parents' consent. Even assuming the District violated FERPA's mandate in this case, a solitary violation is insufficient to support a finding that the District has violated FERPA as a matter of policy or practice. . . . Accordingly, Defendants are entitled to summary judgment on the section 1983 claim to the extent it is premised upon an alleged violation of Achman's FERPA rights.")

4. Definition of "education records" generally

   a. *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991) ("FERPA protects as confidential, information which a student is required to produce or divulge in conjunction with application and attendance at an educational institution. FERPA also protects academic data generated while an individual is a student at an educational institution. Criminal investigation and incident reports are not the same type of records which the act expressly protects.")

b. *Krebs v. Rutgers*, 797 F. Supp. 1246 (D.N.J. 1992) ("There is no dispute that . . . student social security numbers are considered 'education records' and/or 'personally identifiable information' under the statute.")

c. *Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40 (D.N.H. 1994) ("The plain meaning of the statutory language reveals that Congress intended for the definition to be broad in its scope. . . . Since it is undisputed that the files, records or documents maintained by Attorney Constantian in her capacity as attorney for the District contain information which relates directly to Daniel B., they are 'education records' as that term is defined in the statute. . . . While it is not necessary for the court to look beyond the plain meaning of the statutory language in determining what constitute 'education records,' the legislative history of FERPA provides additional insight. When FERPA was initially enacted in August 1974, it did not define 'education records' but provided a non-exclusive laundry list of records and documents which were to be made available to students and parents. . . . The change from the laundry list of items to the definition of 'education records' as it appears today, along with the legislative history of the Amendment, lends support to the conclusion that the congressional intent was to fashion a broad definition.")

d. *Warner v. St. Bernard Parish School Board*, 1998 U.S. Dist. LEXIS 1360 (E.D. La.) ("The fact that Zeller took the letter home, rather than placing it in Scott's cumulative file, does not make the letter non-educational. 'The statutory language does not distinguish records based on their source.'") (citation omitted)

e. *Connoisseur Communication of Flint, L.P. v. University of Michigan*, 584 N.W.2d 647 (Mich. App. 1998) ("Student-Athlete Automobile Information Sheet" is an "education record.")

5. Student disciplinary records as "education records"

a. *Norwood v. Slammons*, 788 F. Supp. 1020 (W.D. Ark. 1991) ("[T]here is no constitutional right of general public access to the disciplinary or investigatory records of a post-secondary educational institution" that would supersede FERPA.)

b. *Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257 (Ga. 1993) (Student disciplinary records "are not of the type the Buckley Amendment is intended to protect, *i.e.*, those relating to individual student academic performance, financial aid, or scholastic probation.")

c. *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport*, No. 393,332 (1st Dist. March 4, 1994) (unreported) ("It is clear from the testimony about LSU-S disciplinary procedures that the records and transcripts of the meeting are not analogous to criminal court procedures. . . . [T]he requested information constitutes a confidential part of the two students' educational records within the purview of FERPA . . . .")

d. *Selkirk v. University of Oklahoma*, No. 84,721 (2d Div. Ct. App. May 2, 1995) (unreported) ("Records of campus disciplinary actions are education records under the Act because they are directly related to one or more students and are maintained by an educational agency or institution.")

e. *State, ex rel. The Miami Student v. Miami University*, 680 N.E.2d 956 (Ohio), *cert. denied*, 118 S. Ct. 616 (1997) ("[U]niversity disciplinary records are not 'education records' as defined in FERPA.")

f. *United States v. Miami University*, No. 2:98-0097 (S.D. Ohio Feb. 12, 1998) (unreported) ("The Ohio Supreme Court reached its conclusion despite numerous indications that the FERPA nondisclosure provision indeed applies to student disciplinary records, not the least of which is FERPA's unavoidably broad definition of 'education records,' which the Ohio Supreme Court majority opinion quoted but did not discuss . . . . It is difficult to conceive how student disciplinary records would not be 'information directly relating to a student.'")

g. *Daily Tar Heel Publishing Co. v. University of North Carolina*, 496 S.E.2d 8 (N.C. App.), *rev. denied*, 510 S.E.2d 382 (N.C. 1998) ("Given the breadth of FERPA's definition of 'education records' . . ., the student records [used in university disciplinary proceedings] are protected as 'education records' under FERPA and are 'privileged or confidential pursuant to the law . . . of the United States' under [state public records law]. Thus, the trial court correctly ruled that the Undergraduate Court was entitled to hold a closed session to prevent the disclosure of education records protected by FERPA.")

h. *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998) ("The legislative history of the Family Educational Rights and Privacy Act indicates that the statute was not intended to preclude the release of any record simply because the record contained the name of a student. The federal statute was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student. Nevertheless, in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy. Prohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind the Family Educational Rights and Privacy Act. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public. . . . In light of the above-cited cases interpreting the federal statute, and the legislative history of the statute, we hold that 'education records' within the meaning of the Family Educational Rights and Privacy Act do not include records of parking tickets or correspondence between the NCAA and the University regarding a student-athlete accepting a loan to pay parking tickets.")

6. Law enforcement records as "education records"

   a. *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991) ("It is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to the type of records which FERPA expressly protects; *i.e.*, records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files.")

   b. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227 (D.D.C. 1991) ("Plaintiffs have a substantial likelihood of success on the merits of their claim" that FERPA's limitation on the release of law enforcement records violates the First Amendment.)

7. Definition of "student"

   a. *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990) ("[A] rejected applicant who receives permission to audit a course does not have the right to access admission information which is afforded to a student in attendance.")

   b. *Norwood v. Slammons*, 788 F. Supp. 1020 (W.D. Ark. 1991) ("Plaintiff [who had been accepted for admission but had not enrolled] does not allege a violation of FERPA, as the records she seeks do not pertain to her nor does plaintiff allege that she has ever attended the Fayetteville campus.")

8. Definition of "educational agency or institution"

   a. *Kneeland v. NCAA*, 650 F. Supp. 1076 (W.D. Tex. 1986), *later proceeding*, 806 F.2d 1285 (5th Cir.), *cert. denied*, 484 U.S. 817 (1987) (The NCAA and Southwest Athletic Conference "do not fit the definition of educational agency or institution under the Buckley Amendment. Moreover, the Court is not convinced that the information in issue is 'maintained by [Defendants] acting for the agency or institution,' *i.e.*, their member universities. The record reflects that the information maintained by the Defendants is not necessarily provided by their member universities; it is often not available to member universities, and, as this case demonstrates, it is often used against the member universities. It can hardly be argued that the information is held for the member universities.")

b. *Klein Independent School District v. Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988) (School teacher's college transcript, located in her school district personnel file, is a public record; "Because she is an employee and not a student of the institution requested to disclose her transcript, she does not fall within that class of people for whose benefit FERPA was created. Ms. Holt is not a 'student' and her college transcript is not an 'education record' protected from disclosure pursuant to FERPA's provisions.")

9. Scope of "health and safety emergency" exception

a. *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997) (Detailed discussion of history and meaning of regulatory provision, which leaves "some discretion to educational institutions in deciding when the emergency exception should apply.")

10. Challenge right is not a grade grievance mechanism

a. *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990), *later proceeding*, 946 F.2d 1542 (5th Cir. 1991) ("We interpret [FERPA] as precluding a cause of action whose purpose is to challenge, except for ministerial error, the grade assigned to a student. . . . None of the types of errors sought to be corrected by the statute includes 'error' founded in a dispute over the way a teacher grades his students. Students' grades, as reflected in educational records, can only be inaccurate or misleading if they do not reflect what the grader intended or if they are mathematically incorrect. . . . Congress could not have intended . . . to afford students a federal right, enforced by federal regulations, to challenge their teachers' or educational institutions' grading process. Such an action would effect a dramatic intrusion of federal authority into the setting of academic standards. We cannot conceive that Congress meant to legislate such an intrusion implicitly or indirectly.")

b. *Adatsi v. Mathur*, 1991 U.S. App. LEXIS 13087 (7th Cir.) ("FERPA addresses the situation where a student seeks to have misleading or inaccurate information in his records corrected. There is nothing inaccurate about Adatsi's grade. He just feels he deserves something else. This fails to state a claim under FERPA.")

c. *Lewin v. Medical College of Hampton Roads*, 931 F. Supp. 443 (E.D. Va. 1996), *aff'd mem.*, 120 F.3d 261 (4th Cir. 1997) ("Whatever may be the purpose of FERPA, it is not to permit disappointed students to federalize disputes over the academic accuracy of their professors' grading methods and substantive test answers", even when contested test answers are "objectively verifiable.")

d. *Altschuler v. University of Pennsylvania Law School*, 1998 U.S. Dist. LEXIS 3046 (S.D.N.Y.) ("[P]laintiff's claim is not the type of dispute which may be brought under FERPA. Altschuler's claim that he was denied a hearing which would have allowed him to challenge the transcript, explanation sheet, and explanatory memorandum is, in essence, a grade dispute which does not state a claim under FERPA.")

11. Relationship between FERPA and state public records laws

a. *Rathie v. Northeastern Wisconsin Technical Institute*, 419 N.W.2d 296 (Ct. App. 1987) ("Although [FERPA] does not provide a privilege analogous to a doctor-patient or attorney-client privilege, the Act and the regulations promulgated under authority of the Act provide a confidentiality and a right to privacy. The federal Act thus specifically limits the disclosure of the requested student records. Whether this limitation amounts to a specific exemption as required by [Wisconsin's open records law], however, need not be reached by this court since the student records are unattainable in any case by virtue of the public policy limitation under Wisconsin's open records law.")

b. Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records.")

c. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227 (D.D.C. 1991) ("Defendants' suggestion that the universities may choose to comply with state [public records] law and forego federal funding is unrealistic and disingenous.")

d. *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport*, No. 393,332 (1st Dist. March 4, 1994) (unreported) ("The plaintiffs have also argued that the Buckley Amendment is not a law which prohibits disclosure, only that it provides for the withholding of federal funds for institutions that have a practice of releasing educational records. However, the intent of Congress to withhold millions of federal dollars from universities that violate Buckley is ample prohibition, regardless of how the word 'prohibit' is construed by the plaintiffs.")

e. *Selkirk v. University of Oklahoma*, No. 84,721 (2d Div. Ct. App. May 2, 1995) (unreported) ("Plaintiff argues that, because [FERPA] does not prohibit an institution from disclosing the results of the disciplinary proceeding to the alleged victim of the crime, his case falls within the ambit of the Oklahoma Records Act. . . . It is apparent . . . that the Congressional intent in enacting the [Student Right-To-Know and Campus Security Act] was to create a limited exception to the disclosure prohibition in FERPA relating to educational records. It is equally clear that Congress did not intend to require the information be released but rather intended to vest discretion with the institution of higher education as to whether to disclose the information or not. To the extent that Oklahoma's Open Records Act is relied upon for a right of access to these governmental records, it must yield to section 1232(b)(6) of FERPA.")

f. *Eastern Connecticut State University v. Freedom of Information Commission*, 1996 Conn. Super. LEXIS 2554 (FERPA is "merely a precondition for federal funds" and therefore "provides no defense to the FOIC ordered disclosures" under state public records law.)

g. *Daily Tar Heel Publishing Co. v. University of North Carolina*, 496 S.E.2d 8 (N.C. App.), *rev. denied*, 510 S.E.2d 382 (N.C. 1998) ("Although FERPA does not *require* UNC to do anything, but instead operates by withholding funds, we hold FERPA does make student education records 'privileged or confidential' for [state public records law] purposes.")

B. A.L.R. Annotation

1. *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974*, 112 A.L.R. Fed. 1 (1993)

2. Lynn M. Daggett. "Bucking Up Buckley I: Making the Federal Student Records Statute Work," 46 *Cath. U. L. Rev.* 617 (1997) (extensive review of FERPA legislative history and requirements)

3. Lynn M. Daggett. "Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute, 21 *Seattle U. L. Rev.* 29 (1997) (extensive review of FERPA enforcement mechanisms and case law)

C. Additional Regulatory Materials Relevant to FERPA

1. *Student Assistance General Provisions; Campus Safety*, 59 Fed. Reg. 22314 (April 29, 1994) (final regulations) ("Records created and maintained by a campus law enforcement unit, for the purpose of law enforcement, are not education records and are not protected from disclosure by FERPA. The definition of campus security authority also includes (1) an individual or organization specified in an institution's statement of campus security policy as the individual or

organization to whom students and employees should report criminal offenses; and (2) an official of an institution who has significant responsibility for student and campus activities, but does not have significant counseling responsibilities. Information on crimes reported to these officials could be included in records classified as protected from non-consensual disclosure under FERPA regulations. However, FERPA does not prohibit the disclosure of statistical, non-personally identifiable information. The Secretary does not interpret FERPA to prevent compliance with the timely warning provision, as in a case of an emergency involving the safety of others – even where the identity of an individual may be disclosed.")

2. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12033 (March 13, 1997) (final policy guidance) ("[T]he interplay of FERPA and Title IX raises complex and difficult issues. Regarding requests for clarification on the interplay of FERPA and the rights of an accused employee, the Guidance clarifies that the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment. Regarding whether FERPA prohibits the disclosure of any disciplinary action taken against a student found guilty of harassment, it is the Department's current position that FERPA prohibits a school from releasing information to a complainant if that information is contained in the other student's education record unless – (1) the information directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. However, in light of the comments received on this issue, the Department has determined that its position regarding the application of FERPA to records and information related to sexual harassment needs further consideration. Accordingly, the section on 'Notice of Outcome and FERPA' has been removed from the Guidance. Additional guidance on FERPA will be forthcoming.")

D. Web Sites Containing Information Related to FERPA

1. Family Policy Compliance Office
<http://www.ed.gov/offices/OM/fpco.html>

2. American Association of Collegiate Registrars and Admissions Officers
<http://aacrao.com/>

3. Association for Student Judicial Affairs
<http://asja.tamu.edu/>

4. NASPA, Student Affairs Administrators in Higher Education
<http://www.naspa.org/>

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